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THE RIGHT WAY

FOR

Restoring the late Rebel States

TO

THE FEDERAL UNION;

OR,

AN ARGUMENT INTENDED TO INDUCE THE PEOPLE AND PUBLIC MEN, IN MAKING ELCTIONS AND FILLING OFFICES,

STATE AND FEDERAL,

TO BE GOVERNED BY

THE CONSTITUTION OF THE UNITED STATES.

"The subject who is truly loyal to the Chief Magistrate, will neither advise nor submit to arbitrary measures."—JUNIUS.

SECOND EDITION.

BY ROBERT R. COLLIER, ESQ.

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READER, CONSIDER.

LISTEN to a voice from East Virginia, uttering, in time-honored principles, in studied truth and measured terms, the manner in which the States lately in rebellion should be re-adjusted in their federal relations. The voice is from one who has spent much of his time and money, in every stage of a long life, in seeking, in labors of love, to advance the welfare of his native State. It may be you will listen with less credulity, because the author is not a stranger, and be under the influence of that sentiment ages ago recorded that a prophet is not without honor save in his own country. That deters him not from his duty. It shall not be his fault, if you will neglect the truths herein expressed, because they are *homely* truths. They are expressed with pains-taking concern for exact verity. They look more to the durability of our representative system, than to the immediate advantage of any section, even our own, in the passing hour; except that the passing hour can be best served by what is most likely to secure that durability. The wisdom of ages adorns most of the truths herein expressed. This expression of them, is intended in support of *liberty regulated by law*, which alone can assure social safety and happiness. Neglect of such truths will sting you, reader, in whatever section of our country your lot is cast, or your posterity, with a pungency sharper and deadlier than the serpent's poisonous tooth. It may be that the next generation will find that in this, the observance of principle was not enough valued. Reader, the writer would have you scan his language and rightly interpret it, here and throughout. Then, you may see and know it nowhere speaks vanity, but *fortitude* whose weapon is honesty, and aims, the public good. Most in this life he has source of pride in, and indulges it, is that he is not, nor ever was, governed by that indifference to public affairs, which the selfish hide themselves in and always would have, and often get, others to regard as being moderation or modesty.

INTRODUCTORY OF THE SECOND EDITION.

Since the issuance of the first edition from the Press, the writer has searched into the elementary authors, and into the adjudications of the courts, applicable to the doctrines advanced respecting *his right way*, and he has embodied the results of his labors, in the matters with which this edition is enlarged. He has found nothing in conflict with, and no little in support of, the way suggested as the best for restoring these States to the federal Union. Although so much prominence is given to that special topic, this edition so enlarged, is published, as the first was, less with a view to indicate the right way of acting in this yet fearful conjuncture, than to make an effort to reawaken the popular desire to have the public men respect the constitution of the United States, and in each State, the constitution thereof—that is, to kindle afresh, as in the earlier and purer periods of the Republic, the sentiment in the popular heart, that the first duty of last importance, of every man in office, is to administer it, in the particular part of the general trust assigned to him, with fidelity to the restraints limiting his authority, just as they are, and not as he or any one may think they ought to be constituted. The *written constitution* declares the glory of our system. *That* ascertains and determines the extent to which the individuals trust their liberties to a majority. *That* also defines the extent to which the States, as such, trust their rights to majorities. If that fixed limit be transgressed, by so much the glory of the system will be under an eclipse. It is upon the republican principle the constitution is constructed, and in so far as the structure fails to conform to that theory of individual rights or States-rights, or there is a departure in administering it, by so much it fails of its professed purpose, and ceases to be worthy to be trusted for the protection of either class of rights, against invasions by majorities.

That special topic of the right way in the passing condition of affairs, is handled only with the wish and belief that the

work of restoring the States, shall be rightly done, to the end that it will be stable, when it is done. On the more general subject, the writer will remark that, in his judgment, the obstacle to the perpetuity and improvement of our system, is the multitude of popular elections. The offices so filled, will be sought after most eagerly, and by men less scrupulous than they should be of means of success. They ought to be lessened. The people who do not seek office, look to the observance of the laws, as their chief good. When such elections are so multiplied, the remnant of the people, who are not seekers of office, and remain unseduced, is too small to persuade the public men in authority, much less are they able to compel them, to be under the influence, in their offices, of that respect for constitutional restraints, which is the highest public virtue in a Republic.

As was remarked or predicted by the sagacious De Tocqueville, it has already occurred, to wit, "that when it shall be perceived that the weakness of the federal government, compromises the existence of the Union, a reaction will take place with a view to increase its strength." That weakness was discovered in the inroads by "State-sovereignty," of course. That reaction has now been wrought. The danger now is, of a precipitate increase of the federal strength, over-much, so as to over-master the rights reserved by the constitution to the States, *which are of value*, and the preservation of which is essential to save the system from sliding into a monarchy—which may God avert, and continue the triumph *Washington* won for republican authority over sceptred sway. Can it be that the constitution is to be neglected, until soon the fact will be, as too many lacking fortitude say is already the case, it shall have no influence in the popular elections, or the public councils? The controlling power of moral obligation, on the men in office, and on the people who put them there, must be augmented in proportion as political liberty is enlarged, or else swift destruction awaits the noble structure our ancestors erected. It is not enough that the outward duties of religion be fulfilled with fervor. A sense of justice, in making as well as in administering the law, and a purpose staid on

morality to obey them, must prevail to raise to reverence the inviolability of contracts. Above all else, not only must the truth be perceived, but it must be acted out, that there should be such a separation of Church and State, that it shall be the pride of the clergy to abstain from politics, in the sacred desk. Their own *self-denial* to exercise the right of suffrage in political elections, would widen and deepen their religious influence. To win souls to immortality through regeneration, is their high calling, and it affords fully renown enough to fill the mortal career. As emphatically as it is thus suggested that the clergy should take on denial of the suffrage, let it be added that that is all that is meant. Any legislation so to restrain them, should be resisted strenuously. When it is said they should abstain from politics, especially in the sacred desk, all is meant the expression imports. It is not meant only that one branch of politics might be there discussed, and every other branch excluded. All political subjects ought to be let alone there. The pulpit should be voiceless on the whole subject. What more than any other subject in the Northern pulpits, in recent years, and in the Southern also, has been discussed to the stirring and keeping strife aglow? Surely, no other more than abolition, and none other is more clearly a political question belonging to the forum to discuss and the courts of civil law to decide.

On the topic of the "restored" government of Virginia, which is treated of in an article herein, it is important that the *third* section of the *fourth* article of the constitution, be accurately understood. So much of it as applies reads thus: "no new State shall be formed or erected within the jurisdiction of any other State; *nor* any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned, as well as of the Congress." That is the punctuation in most, if not all, of the reprints of the constitution, in Virginia—it is exactly the same in the instrument as prefixed in the "*Virginia Debates*," —but in *Story's* commentaries, there is only a comma where the semicolon is above next before the word *nor* after the word state. If the comma is right, then both formations of a new

State, the one *within* another, and the other *out* of parts of other States, are made subject to "the consent of the legislatures of the States concerned;" but if the semi-colon is right, then the constitution does not recognize in the general government the power to admit a new State formed within the jurisdiction of any other State; no, not even though the State by its legislature shall have given its consent; but positively forbids the erection of a new State within another; for, plainly, the semi-colon disjoins the members of the sentence, so that the qualification on the power subjecting its exercise, when two or more (or parts of) States are concerned, to the consent of their legislatures, is clearly disconnected with the erection of a new State within another State. So disconnected, the first member of the sentence or section, did not intend to subordinate the erection of one State within another, merely to the consent of its *legislature*, but to interdict it without condition. The earlier prints in the Virginia Debates, in 1788, is more likely to be correct than that in *Story*, whose valuable work is so much later and more latitudinous. Moreover, the semi-colon is used in *Hickey's* "constitution," which is certified by James Buchanan, Secretary of State, to be "correct in *text, letter,* and *punctuation.*" More significant than all these, the sense and context show that the erection of a State within another, was not intended to be subordinated merely to the consent of a *legislature.* It distinctly defines itself to refer to the plural consent of legislatures, and does not include or contemplate the consent of the legislature of a single State. Then and therefore says the objector, a State cannot be severed by the consent of the legislature, and two or more be made out of it. (But it does not follow that it might not less objectionably be done by a *convention.*) Just so, it is, as the objector says, that it cannot be done by the *legislature*; and what harm is done that it is so? Infinitely less than may ensue, and likely will, if the sense and punctuation be set aside, or the constitution be amended, so that the States, by ordinary legislation, may be subdivided, until they become as numerous as the counties, each entitled to two Senators.

PREFATORY.

Prompted by love of country, the author presents to as many as may be supplied with a copy, the thoughts expressed in this little pamphlet. He not only does not intend to invite, but would earnestly discourage, any popular resistance to any plan for restoring the Union. His is suggested for the public authorities to consider, and, if deemed the best, to accept. The thoughts on which his plan would proceed, are not, as yet, current in the public mind: he asks that they be considered well, and, after that, he believes they will become as current as would coin from the mint. These, like most truths that are uncurrent, are not as yet current, only because the public mind is not familiar with them. The people are honest. What a stimulus that fact ought to be to republican virtue in public men.

The plan suggested in these pages, is simple and prompt. It is founded, for its manner, on the IV. Sec., I. Art., first clause, Constitution United States;* and for its principle, to wit—"the republican form,"—on Art. IV., Sec. IV., of the constitution. It is that the government of the Federal Union (and it is as much bound to give us the freedom, as we are to pay it the allegiance) shall authorize the State of Virginia to

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*That IV. Sec., I. Art., is as follows, and it is one of the most important in the Constitution: "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may, at any time, by law, make or alter such regulations, except as to the places of choosing Senators." This authority reposes on the principle that every government ought to contain in itself the means of its own preservation. It is in the Congress, as the chief element of the national authority, *an ultimate* power to be exercised to secure the representation from the State, in case of a *failure* or *refusal* to make *proper* regulations for governing the elections.

renew her representation in the Congress of the United States. That would necessarily imply and impart authority to the State to elect a General Assembly, under and according to the provisions of the constitution of the State, as they were before the "rebellion." All else to revive the suspended civil government of the State, would follow and flow on as natural consequences; and the purposes of the General Government, respecting the free people of color, would not, in the least, be interrupted thereby. Indeed, the Legislature elected under this plan, would be irresistibly constrained to alter the municipal laws that were in force before, and to make them correspond to the federal frustration of the late concluded attempt to "secede."

If the author were slavish enough to offer any excuse for proposing his plan, which it seems the men in authority have not perceived, he might cite the conclusion of the lamented Lincoln's Amnesty Proclamation. He then said that any better plan would be accepted by him. But this author leans not on that reliance: in this age we live in, he cherishes the belief yet, that the toe of the peasant stands firmly nigh to and gently presses against the heel of the prince: he has no apology to make for proposing his plan to be substituted for the one sought to be put into practice, and which can even yet be regarded only as *provisional.* He believes his plan would be permanent, because it is strictly in observance of law; and in exhibiting it, he feels as free as the air he breathes. He knows it is no more designed to do harm, than the air was designed to destroy human life. If this plan be not accepted by the public authorities, it will be found that no other will work well, unless it be well to work the death of the representative system of political and civil freedom. Any other plan will have hitches in executing it, and huge hinges on which reminiscences will long grate harshly, in frequent upstarting, to irritate and annoy and embitter and new-create the fault.

As in popular government it is and will perhaps always be the case, that frequent changes supervene, it may not be amiss to explain what the writer means by the terms "pro-

visional" and "permanent." In the sense that the people can, at will, and often do, change the constitution of the State, *any* existing constitution is only provisional, to endure until another, in a short time, shall be substituted. In that sense, every constitution is temporary, and none is permanent. Such, in fact, has been the habit of the States in this young federal republic. The federal constitution, which established an imperfect *national* government, has better withstood the popular passion for change. The constitution in many of the States, has been changed almost as often as the young man has had his tailor take his measure for his garments. In the light of such facts, the terms are used only to distinguish the one that is irregularly introduced into force and effect, and is avowedly to be superseded soon, from the other that is regularly established, and is professedly to endure, at least for the length of our generation.

This plan, in brief, is, that the Congress shall authorize the States to elect representatives to the Congress, and fix the times for the elections. At the same time, the people of each State, qualified to vote, will elect a legislature, which is necessary to elect the State's Senators to the Congress. The State, being so recognized to be in the practical relation to the Union, will be at liberty, and will see that it is an attendant duty, to elect the governor and other executive and the judicial officers, and also to fill the ministerial offices belonging to each department. If any act more direct is requisite, than the implication from the authority to elect representatives to the Congress, to authorize the State to proceed with the election of a Legislature and the other officers in the home administration, the recourse is accessible in the facts that the State is now under military rule, and the President of the United States, as commander-in-chief of the army, could order *when* the State elections for the home administrations shall be made. This election might be when the representatives to the Congress are elected. After the State is thus put in motion, in the panoply of the civil authority, a convention of delegates could be called to alter the constitution, if necessary.

Since the above was written, the proceedings of the people

of Albemarle county have come under this author's inspection (this, June 10th.) Those proceedings are in accord with the judgment that prompted this pamphlet. They protest against the propriety of spreading the Alexandria constitution over this State, and, at the same time, counsel submission to it, as a *provisional* authority. They declare that—"Entitled to a republican form of government by the provisions of the Federal Constitution, to which they are now remitted, they cannot, without a dereliction of duty, shrink from asserting their right to the same, nor leave their silence to be interpreted into acquiescence, when measures are impending that contravene the fundamental principle of such government."

Now, if "the advantage of gaining time," in respect of any one plan in preference to another, is to overrule the great principle of the consent of the governed, and other valued elements of our representative system, why not at once inauguarate a dictatorship? This would be the shortest way of gaining time. But it is not surprising, whilst the Albemarle plan was on the right principle, that it has failed to gain acceptance. It proposes a needless convention, and, besides, agrees to the North Carolina plan, which is less consistent with our system, than is the PIERPOINT plan for Virginia. Notwithstanding those objections to the Albemarle project, it yet exhibits the first clear streak of dawn, the public had before seen, that has presaged the open broad day; and yet those proceedings, in Albemarle county, propose no plan to remove the first difficulty in the situation, which this pamphlet does. Those proceedings reprobate the plan of using the Alexandria constitution, and it is not inappropriate that this pamphlet, which has for its sole purpose the suggestion of a plan to reach the roots of the evil, shall be the vehicle of reprobation, though in brief, of some incipient steps that have been vehemently intimated. These are the holding of State and National conventions, to amend the constitutions. Why hold either? It is said, to adapt them to the abolition of slavery. No convention is needed for that. The ownership of slavery is already extinguished by force of arms.

Already an emancipation amendment of the Fedefal Constitution is pending, and has been adopted by nearly enough States to ratify it. Already in these States, South, where that amendment has not yet been acted on, slavery has been killed by physical force, and will not be sought to be revived; or if so, without any likelihood of success in Virginia. Then, why a convention for that purpose? A convention would do mischief on other subjects, and is not necessary on this. The Federal constitution is the wisest emanation of statesmanship the world has ever seen—it embraces a cure for every disease the body politic is heir to—a remedy for any emergency. Consult it. It is the genuine scripture of the true political science. Cherish it, as it is. No change is necessary for adapting it, or that of this State, to the abolishment of negro-slavery. As well might the sturdy oak be cut down, or the ancestral tree, on the old homestead, that has yielded its fruit or spread its shade for generations, be dug up or hacked, because it has a rotten limb on its venerable trunk. Lop off the dead limb—that is quite enough. Slavery is already lopped off with a sharp axe and a strong arm. Let the old trunk stand with the other fruitful limbs, in beautiful, genial vigor, just as they are. Many who would advocate a convention, will think that only what they desire shall, *will*, be altered. They are in danger of meddling with strings, the existence of which they do not suspect. They may see the talisman removed, on which the fabric of freedom depends.

☞These articles were written at the several dates they bear. Since they were written, much has been done towards effecting the restoration of the States: but nothing is likely to be or can be done, consistently with the federative system of our complex governments, without applying to the work of restoration, the principal features of the plan herein suggested. Nothing that has been done, in the least prevents the application of this plan; especially in the light of the suggestion that these States being now under military rule, though, at the same time, having *provisional* civil government, the President of the United States, as commander-in-chief, can order elections to be held for members of Congress,

implying authority to elect the State Legislature, &c., &c. The Congress of the United States would only have to admit the elected to seats, and no extra session of the Congress would be necessary, and the delay of the regular session avoided. *Have to admit*—that is, to exercise the authority to admit or not; for, Congress *is* the judge of the *elections*, returns and qualifications of its own members, each house for itself. Neither is that all, nor the most, much as it is, just now. The work in hand is how, *orderly*, to get States back into their practical relations. Of *that*, Congress is the judge. And it ought to be weighed well, and it is of great weight, that the Congress *must* act at first, or *should* act at last, in the matter of restoring these States. Unavoidably, the Congress must in advance give the authority to renew the State's representation in the Congress, or else hold in reserve the power, (when the persons elected under whatever other authority they may be sent up, shall apply for the seats,) to pass on the competency of such other authority to have ordered the elections and given the credentials. The Congress may possibly neglect that power of theirs. On that occasion of admitting the *elect* to the seats, the whole question of orderly restoration of each State, will be open. It cannot be constitutionally foreclosed. Whilst it is true, as the *Boston Post* justly declares, that "the present relations of the national government to *these* States, ought not to be prolonged for the purpose of compelling them to adopt constitutions or laws repugnant to the ideas and sentiments of the people;" yet, it is the right and the duty of the Congress to see to it that the process of restoration be conducted with method and by constitutional means. Must the Congress, the grand inquest of the nation, be silent in restoring the States? Or, is it that they may have voice, but no vote, in the skill and labor of the work? And why should not the Congress have its appropriate work to do?

The writer has not failed to perceive, or to appreciate, the disinclination in the popular mind and the newspaper press, in the South, to discuss the subject of the proper plan for restoring the States to the Union. That disinclination is from

a double spring. It is the general opinion that the federal authorities are intolerant of *free* debate. This, the writer believes, is a misconception. That is one, but not the main, spring of that disinclination to discuss the subject. The other and the main spring is, that the public feeling in these States, South, is very much and unduly depressed—so much so as to be almost indifferent to the mode of restoring the States—indeed, quite in despair of ever again enjoying the rights of States in the Union. "Give us *civil* government," is the popular clamor, without considering whether the way in which it is attempted at the start, can be continued to a completion of the restoration. That gloom is owing to the fact, chiefly, that the supposed right of secession is squelched. That used to be esteemed, by many, to be the totality of States-Rights. No wonder they who so esteemed it, are despondent now it is strangled by the blood of its discomfiture. That was their mistake, and a grevious mistake it was. *It* was the immediate cause of all our present and pressing woes. If they who indulged that mistake, could be disabused of it, in their minds and hearts, their hope would be healthy and their expectation vigorous. Indeed, secession was not the sum total or the substance of States-Rights. If it were ever a right at all, it was a right to the damage of its possessors. It only excited a delusive expectation, so perfectly imperfect a right it was. It excited the expectation of continuing peace, in the event of its exercise. That expectation has been signally and explosively disappointed in the recent and first attempt to put it into practice. On no future occasion, would it be any more likely to be peaceful, or to prove to be an attractive shibboleth. Then, why was it claimed, or should it ever be again, as a right? If not peaceful, it is only cumulative and superfluous. If not peaceful, it is only another name for the *right of revolution*. This blushing rose does not smell as sweet by that other name. There *is* much in a name. A blind man would put in the cup cow-dung, called sugar, to sweeten his coffee. By the name of "*secession*," the right to resist usurpation—to throw off old forms, and to institute new ones with fresh or firmer guards for the

people's future security of happiness—is divested of all the glorious memories that cluster about the old and well-known name of the right of revolution. When the right is invoked by the old familiar name of revolution, the invocation means war; and preparation is made for war. When it is invoked by the new name, it means peace in the imagination of its assertors; and when war swiftly ensues, they are all unprepared for it. Amidst the vicissitudes of the fortune of war, "secession" could set up no banner for the union of all classes of the people. A right then it is (if it exist in theory at all) to the disadvantage of them that asserted it. In practice it is ensnaring, though in theory it was charming. The theory is now exploded and expelled: at least, its advocates whom no argument could reach, now dance to the music of the Union, after a long serenade of the trumpet's clangor and the cannon's roar. Yet, nevertheless, the right of revolution remains, and all the valuable rights of the States, remain. The right to regulate suffrage—the right to representation in the Congress—a free, but not libellous press—a fair, but not slanderous speech—and every other right of any value, the list of which is long—all remain. Nor is there any room for the despondent belief that the rights subsisting and of value, though suspended by the State's delinquency, are to be taken away. On the contrary, whilst the "seceding" States might from the first have been treated as States that had ceased by their own acts to have any rights in the Union, and ought to have been declared out of it, and then, *hence*, might, and probably would, now be dealt with as conquered provinces, the federal authorities, not altogether free from moral restraint, or even legal checks, disavow such to be the intended treatment, and proclaim the purpose and solicitude to restore them to the Union. Nor should any timidity exist in the minds of the private citizens, or on the part of the newspaper press, to discuss freely, *if fairly and honestly*, the application and enjoyment of the rights that are potential. The federal authorities have given no sufficient evidence of a design to suppress what ought to be published or spoken. It is not evidence to that effect, that as much latitude is not allowed under military

rule, as might, with impunity or even applause, be indulged in the milder and more equable reign of the civil law. Nor is it such evidence displayed in the fact that newspapers have been suppressed, the conductors of which, under misconception, and whilst the civil law was in abeyance, indulged abusive tempers. The liberty of the press cannot be justly claimed under military rule over a conquered province or a subjected State, to have the same extent, if indeed it can be claimed to be capable of existing at all, as under the civil law. In the one case, whatever liberty the press may have, is at the pleasure of the military commander; whilst, in the other case, the liberty of the press consists in this, that neither the courts of justice, nor any other judge whatever, can lawfully proceed to suppress or check it, except only by the trial by jury.

The writer's purpose which he here distinctly declares, as is indicated, perhaps, sufficiently already, is to pursue to everlasting death that evil principle, called State-secession, which has so long and exceedingly infected the public mind and infested the public counsels. It has been already slain by the sword; *that* was its physical death. By the argument stated above, the writer seeks to subject it to the second death, by the most destructive views he has conceived to subject its spirit to. He will now speak as gently as he can, of those who quickened its mortal career to so much success, before it reached its physical death by the sword. He has but one tear to shed, and then his eyes sparkle with joy; and that tear is shed at the grave of the Confederate soldiers who were more numerous far and not less heroic than the seventy thousand Romans who were "killed on the spot," at Cannæ, by Hannibal's Carthaginians.* Of the "Confederates" who are so lamented as to elicit that tear, not many in the proportion were of the original secessionists, of whom the writer will proceed to speak a little space, and by way of taking a glimpse at the interior view of the great rebellion.

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*I none the less lament the slaughter of the Union soldiers, except the foreign mercenaries who, not impelled by love of liberty or pride of nativity, fought for land and richly gained a grave.

It often happens that errors of opinion of much importance and extensive influence prevail, simply because no one will take the trouble to contradict them, at the outset, or to confront their march, with steady firmness. It is now being said that secession has been put down by the war. It is only true that it has ceased to be an illusion. The fact is that secession never was uppermost, to be put down in the popular judgment.—On the contrary, a vast majority in the South have always denied the doctrine. John C. Calhoun never espoused, though John Q. Adams did assert it. It is true of the whole country, as of the qualified voters of this city, that only a few espoused that disorganizing and incompatible doctrine. In Petersburg, out of a voting population of eighteen hundred, just before the war, less than two hundred and fifty were in support of secession as a State-right. Yet nearly all that voting population, three-fourths of them being under the age of forty-five, were in the war, as soldiers or other "Confederate" servitors. And now, because they were in that service, they are claimed to have been secessionists, and many are discredited who are now found asserting that they were not in favor of the war, but friends of the Union. They were in the war, because they (and a proportional number of the whole South) suffered themselves to be wheedled into it, by that anarchical, and place-hunting, and ever active party of secessionists whose conduct always evinced a determination to rule or ruin. Though eager for the war and addicted to efforts of laborious zeal to bring it about, making the while asseverations that no war would be superinduced, they have the reputation of not having done their part of the fighting, but being best fed out of the public crib, during the terrible convulsion of this youthful gigantic country driven by their counsels to the dreadful verge of utter ruin. These men have been the swiftest to apply for pardons. And it can now be seen by the careful observer, that they who before the war, were advocates of secession as a theory, are still seeking to make the impression that the war was waged to establish that right, in practice; whereas it is the fact that seven-eighths of the people were deceived into the support of the war, on other

grounds of inducement to the acts of State secession, and nearly all of them with the view, swaying them, to make more sure the ownership of slaves, that was secure already. That it was secure in the States before the war, had been demonstrated by votes in the House of Representatives on three memorable occasions, to wit, in 1796, in 1833, and in 1859, (I believe were the years), when, at each time, a resolution was in that House adopted, almost unanimously, to the effect that the general government had no power to interfere with slavery in the States. How much less secure it was made by the war, the end of the war has told. How much the false doctrine prevalent in the South, that the people are sovereign in making and amending constitutions, to the extent of destroying an existing property, emboldened the North, and even excused them, in urging them on to slay negro-slavery by the sword, under cover of a design "to save the life of the nation" against the avowed attempt of the secessionists to dismember the Union, the world will probably never understand. It is under the influence of the fact that the heart of the people was not in support of secession which that party, small in numbers, but large in activity and deceptive powers, sought to establish, that the people of the South have so readily and cheerfully acquiesced in the result of the war to the utter overthrow of that disorganizing doctrine which, whilst it has been so killed off by the war that it can never again be wielded as an element of deception, is yet cherished as a sound doctrine in theory by many of those who used it with such sad consequences to the South, and who would be willing to strive again to set it on its crippled legs, if they were strong enough to make the attempt. (Let it not be inferred from this vein of thought, drawn from a storehouse of facts, that anything here said carries the intimation that the late owners are not reconciled to the emancipation of their slaves. Such inference would be wrong, as such intimation, if intended, would violently assault the truth.) It is from the lingering attachment of the original secessionists to the exploded theory, that the false accusation springs to vex the patience of honest men who are right-thinking politicians, to

the effect that men who have all the time of the war been friends of the federal Union, were, during the war, (if they remained in the South,) either false to the South, or are now false to the North. There is not a word of truth in the unjust imputation. It is false in every sentiment and syllable. It is perfectly consistent with the nature of the human heart and the structure of human society, that, with profoundest honesty, a man may have been a friend of the Union, and yet have been willing to spend and be spent in support of the war on the side of the South. To be brief, I will simply illustrate the proposition thus: I see my father in a quarrel —think him in the wrong—tell him so—even tell others that such is my deliberate belief—but he will insist, and after ample time for reflection, he gets into a fight—the odds are against him—I go to his help and take a hand in the fray. The principal man in the quarrel and fight was, before either, my friend; and I believed, during both the quarrel and the fight, that he was in the right. After the fight is over and my father is whipt, I tell his antagonist I thought all the time he was right and my father was wrong—but *he was my father*, and I took his side. Was I either false to my father, then, or to my friend, now? No, neither. In the late rebellion, the South was my father—the Union, my friend. I took part with the South—the South is whipt—and I am, as I was, the friend of the Union. It cannot be justly said that I was false then to the South, or false now to the Union. According to natural instincts, and in the depths, as well as on the surface, of the political philosophy of our system, I am and have been true to both, and by other conduct would have been false to the South, then, or now false to the Union.

The men who before the war, opposed it, who contended that there was no sufficient cause for it—who did least in prosecuting it—were in very truth the men, when calmly viewed below the fretful surface, who did most for the South. For one, though I did a little to aid in the war, and yet never for an hour believed the South could be as well off out of the Union, as in it, I will never admit that I would not have done more for the South, if I had refused to give any aid of any

sort in support of the war on the side of the South. They who did nothing in that way, have done more for the South, than they who in that way of bad activity, did most. That is just as clear as it is in any other wrong, that they who did most to execute it, are they who are most to be blamed. In my father's fight wherein he was in the wrong, in case my aid under the impulse of natural affection, uncurbed by reason, had given him success, how deep should be my sorrow, and loud my lamentatian, that the evil effects of his victory over my friend who was in the right, had brought a neighborhood into trouble, or a nation into calamity, which it might require ten years or a century to correct. Then, let not him who did most to carry on the war or was foremost to bring it on, take to himself, or be allowed by any to have the praise over him who would, if he could, have averted the bold onset of an attempt that has run its career to the reverse result. The end of the attempt is full enough of evils which its permanent success would have augmented. Success with a view to reunion, is the only success that would have been better than defeat to the South. The original secessionists should stand aside, in shame, and the friends of the Union, in regret, who did most in the war, and let them who did the least for the success of the war against the Union, and so did most for the South, proceed now to repair the ruins they were unable to prevent.

It is not improbable that these men who were original secessionists—men bolder than brave, and more artful than wise—will strive to have the "Confederate" war debt paid. If they succeed, they will receive much of the payment, and by some shift contribute but a little. Nor is it unlikely that with the boast that they were sincere in their devotion to their *principle*—with which boast every field of election will be vocal—they will succeed in deceiving the people to put them in office again, in order to soothe their wounded pride and sore humility under the discomfiture their *principle* has encountered. A bad principle should elicit no sympathy, in its defeat, for its advocates. The people should be wise and just to tell them: "You deceived us once; that was your

fault: if you deceive us again, it will be our fault." Besides, it would not be honest and just in the people, by putting them in the public service again, to rob them of the crown of political martyrdom, which they declared before the war, *if* it came and they failed in it, would be glory enough for them —it was so sweet to sacrifice one's self for one's country, come death or defeat in the struggle. As they were not killed, let them living wear the martyr's crown, in private walks.

It becomes the writer, in a sense of justice to others and himself, to state that, in his observations on "the Wheeling and Alexandria constitutions," which he reprobates in the claim set up for them that they cover and convey a rightful authority in the so-called "restored" government of Virginia, he does not intend to impute to any who have taken the inconsistent oath to support it *and* the constitution of the United States, an act of intentional perjury. It is an oath in the forms of law prescribed, and persons authorized to administer oaths, have administered it. If possible it ought to be taken by all, and certainly every one who has taken it ought to observe it, in its purposes and spirit. *No one has any right to mental reservation in taking a legal oath:* and without legality no ceremony is an oath: nor can any man not legally charged with the service, administer a legal ceremony. No one who has not authority to administer an oath, can impose the obligation of an oath, by any formality wherein the party submitting to it, under constraint or by consent, is not required by the laws to be subject to a prescribed oath.

The recent occasional forms of oath imply that the party sworn has the right of mental reservation in taking a legal oath. The implication is, in this, that some forms recite that the oath is taken without mental reservation, as though the party would have that right, if the denial of it were not inserted. The practical effect of the occasional recital of the denial of the right, is that the party sworn, observing the absence of the denial in the present instance, assumes that it is *not* intended in this case, as it *is* required in some others. It is thus made evident that the better practice would be not to insert the denial in any case, and so to leave the ceremony to

the simple effect, unassisted, and legally cutting off the right to mental reservation, in all cases, without concession, or exception, or cavil of any sort.

In the matter of oaths, no less than in other matters, no person who is not appointed by the law, can administer the law. It would be honorable to all societies which are unregulated by laws enacted by the public legislature, if they would substitute the pledge of honor in the stead of the mockery they indulge, if indeed any of them do pretend to administer oaths, to bind their members or officers. Morality is more honored, and honor is better served, by the neglect, than by the practice, of such serious mimickry. Indeed, the more solemn the occasion, the more reprehensible the trifling with it.

Three things are necessary to constitute an oath: (1) *one party* to swear (2) *another*, on (3) *the occasion*, all three appointed by the laws. In all Christian countries, and with very much minuteness in Virginia, the laws determine *when, and by, and to whom*, prescribed oaths shall be administered.

In the light of these allegations, it is true that one who has gone through the mere forms of taking an oath, when the transaction was not required or recognized by law, has the right of mental reservation, so as that afterwards, in case he fails to comply with the formality he passed through, however, and yet to much less extent, he may be censurable for trifling with a sacred ceremony, he cannot justly be charged with legal or (so absurdly to speak) *moral* perjury. Observe the two points: (1) The party is culpable, but not guilty of any crime; and (2) he had right to mental reservation, because the party he was dealing with, on an occasion not known to the laws, had neither legal authority nor adequate moral power to impose the obligation of an oath. The party had the same right to mental reservation, he would have had to recant a rash promise made on the same occasion in any other form. As manslaughter is not murder, nor so criminal, though it is culpable; so, trifling with oath-taking, is not perjury, nor so culpable, though it is sinful.

Whilst all that is true of the oath specially adverted to,

the writer is not able to understand how he can escape perjury, in fact, though not by intent, who has taken it, if the party he dealt with was authorized to administer it. The writer is not disposed to blame any one in particular who has taken it, except to this extent, he does blame all such: He believes it would have been wise for all the people of the State to have declined taking it, for the reason that its two distinct obligations are so contradictory, the one of the other, that both cannot be complied with.

Though this preface is already unusually full in reference to the matters in the text, still the writer judges it not unsuitable to extend it somewhat in one distinct direction, and to enlarge a little in another direction. This purpose, first, is to say why the most difficult of all the problems involved in the work of restoring the States of the Union, is not discussed. What is to be done with the colored people lately slaves, is that problem. Adventurous as any may think the writer to be, and unable as he feels himself to make a smooth and firm path the labyrinth he has attempted in much feebleness, though with some confidence, to thread, he declines to solve that problem of the future of the negro. He ventures to say it is too vast for any one man to master, or any one generation of men to adjust. He will only say, as Jeremy Bentham expresses it, who is sometimes sage, at others, silly, that we cannot reason with a fanatic armed with *natural right*, which every one understands just as he likes; applies as it may suit him; of which he can yield no part, retrench no part; which is inflexible, at the same time it is unintelligible; which is consecrated in his eyes, as a dogma, and from which no one, he thinks, can depart, without crime. Instead of investigating the principles of legislation by their apparent or probable effects, and accordingly determining them to be good or bad, he considers and adopts or rejects them, with single reference to his standard of "natural right"—that is to say, he substitutes for the reason of experience, the chimeras of imagination.

The subject of State disqualification to hold Federal office, which is proposed to be enlarged on, in ending this preface,

involves a point that has long been in dispute and often under discussion, to settle which a good opportunity would be afforded in enforcing this way of restoring the late rebel States. The point is, whether, by the constitution of a State, any disqualification can be superadded, so that a man, though twenty-five years of age, and an inhabitant of that State in which he was elected, at the time of the election—he having been seven years a citizen of the U. S., and elected by electors qualified to vote in the State for a delegate to the most numerous branch of its legislature, which are all the qualifications the constitution of the U. S. requires *specifically*, shall concur in him to entitle him to the seat in the House of Representatives, shall, notwithstanding the concurrence of those requisites, be ineligible by reason of a disqualification prescribed by the constitution of his State. The point has been supposed by many to be presented, when it was not in point of fact. In *McCreery's* case, in the House of Representatives, in 1807, it was, by an *act of the Legislature* of Maryland, that the residence was required as the act prescribed. In *Trumbull's* case, in the Senate of the United States, from Illinois, the facts did not bring up the point plumply. Several of the State constitutions provide that men in the State judgship shall not be eligible to *"any political office,"* nor within twelve months thereafter. Some of them in those terms so provide, whilst in others the prohibition is enlarged in terms to embrace *state* or *federal* office; whilst in some the expression, *during his term of service* as Judge, is used; and in others, *the term for which he was elected* to be the Judge. This question is likely to arise *anyhow*, and especially if the Congress at its next session shall claim it to be their right and duty to determine whether any State can *only* be authorized to renew its representation in the Congress, by an enabling act of the Congress—not the question of the eligibility of an acting or recent Judge at the time of his election to the Congress, which may possibly arise, but that same question, in the principle of it, in respect to men who have recently held other offices, which is almost certain to come up. The Alexandria constitution, if it is of force, prescribes that no person shall hold office

"under *that* constitution," who has held office under the so-called Confederate government, &c., &c. No such disqualification is prescribed by the constitution of the United States, though by the act of the Congress of July 2, 1862, the prescribed oath is a disqualification of any and all to hold federal office, who aided voluntarily in the rebellion. Now, then, in case that act is repealed, as the writer thinks it should be, for want of constitutionality, and a man is elected to the Congress by the people who, being unrestrained by the disqualifying provision of the State constitution, will give him votes enough to entitle him to the return, shall the Congress, or should they, admit him to the seat; and admit him, because the constitution of the United States does not, whilst that of the State does, provide specially that in such case he shall not hold the office? If so, the State's interdict is a nullity. It would be equally clear, or clearer, that a provision in any State constitution, to the effect, that a recent Judge, or one exercising the office of Judge, by due election or appointment, in his State, shall not be eligible to any federal political office, is also a nullity. Under such decision or ruling by the political or judicial authority, the State constitutions should not be encumbered with any such disqualifications. They would serve only to give an uncertain sound. And in respect to the ineligibility of the Judges, if the State's interdict of elections to *any* political office, is interpreted to be confined to State offices in the *home* administration of the State, and not to include federal offices from the State also, the disqualification by the State is quite useless. The only purpose of the disqualification is to preserve the integrity of the bench, by taking away the temptation to seek popularity by swerving their decisions to acquire it. Eligibility to the more lucrative and distinguishing federal offices, is the principal source of temptation. As Patrick Henry said, "bring up the federal allurements and compare them with the poor, contemptible things that the State legislature can bring forth." There is indeed no other merely State office that is at all likely to tempt the Judge to quit the bench, to get it. The purpose of the disqualification would be utterly disappointed, if the State's Judge is admissible to federal office.

It is appropriate to the times that the general subject of State-disqualifications for election to the Congress, shall be dwelt on to be elucidated; if the writer shall be fortunate by argument to throw any light into its intricacies. It has been debated in *McCreery* and *Trumbull's* cases, almost to exhaustion. It would be too voluminous to reproduce the arguments so powerfully put for and against the power of the State, by *Randolph* and *Love*, on the one side, and *Rowan* and *Quincy*, on the other, in McCreery's case, under a *State-Statute*. It is not necessary to dwell on the difference between the question, when it arises under the constitution of the State, on the one hand, and under an act of the ordinary legislature, by which is meant a State-Statute, on the other hand. Everybody knows how more significant and less reversible, and hence more respectable, is the constitution of the State, than is an act passed by its legislature. Besides the specific provisions of the constitution of the United States, defining what requisites a man elected by the people to the Congress, must possess, to entitle him to the seat, the *ninth* amendment prescribes that no power retained by a State shall be disparaged by the delegation of the powers the States thought fit to confide to their general government. With only that much premised on the general subject, a view will here now be presented, which is not so much as intimated in the discussions to which it has hitherto been subjected, as thorough as were those discussions by men of eminent abilities. This view will be taken under the concession that when a citizen, who is fully in all respects qualified, presents his credentials, the Congress *must* admit him, they being the *judges*, but not the authorized prescribers, of qualifications. This, then, is a view to be taken and acted on by the voters in the State, before and at the election. It demands the attention of every citizen, no less on the subject of suffrage in political elections, than in other matters, whether it is his duty to obey the laws of the State. Any law his State has enacted, binds him, until it is adjudged by the supreme court of the United States, to be repugnant to the constitution of the United States, and therefore void. No law passed or rule prescribed by the Con-

gress, of and by itself, can make void the law of the State. Hence, though the man returned to the Congress be qualified under that constitution, by his having the requisites concur in him, which it prescribes, the duty of the voters to obey the laws of the State, remains in its high import repellant of the disfranchised at and in the election, so that he should not be voted for. The law of the State prescribing the disqualification might be enforced by the State, by fine or imprisonment, or by both, for violating it. The people have not a right to elect whom they please, but such only as are within the law of eligibility. We are not a lawless democracy, nor in a state of nature unorganized.

On this day (September 20th) a letter touching the principles under consideration, falls under my eye. It is a letter from Hon. J. M. Botts. The subject is of great importance to the public. As I believe Mr. B. is in great error, and his standing just now may mislead others, I trust to be excused, and justified by him, for making this attempt to correct his signal mistake. There is much in that letter that challenges assent, for it is loyal to the Union; but no little is in it, that ought not to be received as sound, for it is not true to the real rights of the States. All he urges to the effect that the enactments of the Congress ought to be respected and obeyed as law, until they are repealed or adjudged by competent courts to be unconstitutional and therefore void, is correct. Clearly in that principle it may be seen, and ought to be felt, that the acts or ordinances of State legislatures and city councils, ought to be obeyed by the citizens within the jurisdiction, as long as they are in force in the forms of law. If popular opinion or individual judgment may determine any one enactment to be of no force or of modified effect, so might the whole code be set at naught. The leading doctrine of his letter, however, it seems to me, has no footing in our system, and is violently repugnant to it. He cites the *third* section of the *sixth* article of the constitution of the United States, which requires the oath "to support this constitution," and also prohibits particularly any religious test oath for any office. He then says: "Here, then, is to be found the pro-

hibition, and the only prohibition, upon the action of Congress:" (to wit:) "that no *religious test oath* shall be required."

Now, I am simple enough to apprehend that a single question will show up the fallacy. Has the Congress the authority to prescribe an oath disqualifying him who will not take it, to the effect, or in terms, that he has done no act since the rebellion ended, *adversely to the extension of suffrage to negroes?* or that in future he will advocate negro suffrage? That is not a religious test oath. Who will contend—will Mr. Botts—that the Congress has constitutional competency to prescribe such an oath, excluding from eligibility, or capacity to take the seats in the Congress, all such as could not conscientiously, or would not, take such an oath?

Mr. Botts adds, and labors logically to show that, "the true reading of *that* provision, as it seems to *him*, is, that Congress may prescribe such other qualifications" (than those they are expressly authorized to see shall be observed) "as their wisdom and experience may hereafter suggest;" &c. So far from its being true that the Congress may impose (and it would be an *imposition* in the odious sense) such other qualifications as circumstances might arise and conspire to prompt them to, whilst the constitution is unaltered, the truth and the practical extent of the authority of the Congress, are, that they shall see to it that no man shall be admitted, unless the qualifications in terms prescribed, do concur in him. If *not to have prohibited* the power to the general government, is to have given it authority to impose disqualifications, then the constitution of the United States, is not composed of *grants of power*, as all parties have hitherto conceded it is, but it is an instrument comprising plenary power, unrestricted by reservations to the States or to the people, and unlimited, except where the limitation is expressed. If that be so, then the federal constitution is an absorption of the whole system; except only powers prohibited to it. That the legislature of a State may fix the representative age, or prescribe the anti-duelling oath, to which Mr. B. refers, is manifest in this that the power is not prohibited to the States by the constitution of the United States, and is, by the absence of such prohibi-

tion, in terms, "reserved to the States respectively." The requirement that the members of the State legislatures," and certain other State officers, shall be "bound by oath or affirmation to support the constitution of the United States," is not a prohibition on the State to prescribe other requisites for State officers. If it were so, then in the many cases in which that constitution prescribes no qualifications, the State could prescribe none. But, say many persons, this question involving the conflict of authority to prescribe the qualifications, cannot arise, except in a case of contested election; because, say they, the Congress is bound to admit all presenting *proper* credentials. If that were just so as stated, still the question challenges attention and demands decision, what that word *proper* means? This question is capable of determination by Congress, however, in other cases than those of contestants for the seat. In any case, the Congress may look into the propriety of the credentials before admitting the applicant to the seat. The manner of initiating that investigation is provided by a distinct prescription of the laws. *See,* Stat: at large, United States, Vol, 12, p. 804. The act of the Congress there recorded, delares that "the clerk" (of the House of Representatives) "shall, make a roll and place thereon the names of all persons, *and of such persons only,* whose credentials show that they were regularly elected in accordance with the laws of their States respectively, or (*and*?) the laws of the United States." Thereunder, the inquiry arises, what law authorizes an election to be held at the call of a provisional governor? Beyond,—what clause of the constitution of the United States, or section of law, authorizes the President to appoint a provisional *civil* governor of a State, in any exigency? The authority is not to be found by fair or endurable construction, within the decision of the supreme court of the United States, in the Rhode Island case, *Luther vs. Borden,* 7 Howard, in which the court only ruled that the President might and should interpose, under and by authority of the act of the Congress of February 28, 1795, "on the application of the legislature of the State, or of the executive thereof, when the legislature cannot be convened."

In such an exigent and urgent conjuncture, when there is "an insurrection" in the State, "*against the government thereof*," the President of the United States may decide who compose the legislature and who is the governor, all claiming to have been duly elected. That decision holds, as expressly, that in any case not within the conditions contemplated by that act, it still "*rests with the Congress* to decide what government is the established one of the State." That act presupposes a foregone election, to say no more. It did not grow out of a rebellion against the government of the United States, nor does it apply to such a case or the case of a State having failed or refused to hold the elections. So far is that act, as well as that adjudication, from conferring authority on the President to *appoint* a civil governor. Much less does it confer on his appointee to the chief executive magistracy of a State, any authority to order an election of the State's representatives to the Congress. Of very little value will be the credentials so derived. The propriety of credentials, into which the Congress may examine before the producers of them are admissible to the seats, is comprised in, and can be a lawful consequence only from, the regularity of the election. Such elections will be irregular, and the consequential credentials will be without validity. The Congress has not conferred, nor has that body the constitutional competency to confer, the authority on the President of the United States, to appoint a civil governor of a State. Such authority would vest him with sovereign power; whereas, by the constitution, he is merely the agent of the sovereign power. It is its duty to see to it that each State shall have the republican form, and the same duty is devolved on the President to the full measure of the executive competency; but yet, nevertheless, the authority to make such an appointment, cannot lawfully be entrusted to him by the Congress, nor, consistently, by the people of the States, even by amending the constitution of the United States, because such authority in him is utterly incompatible with republican forms. By the existence of such authority in the President, if it were formally conferred on him, the constitutional guarantee of the republican form,

would be changed into an anti-republican guarantee of dictatorial competency in the President. It is not possible, in any sense, or by any means, to consist with self-government, that the election of their governor, without the antecedent consent of the people of the State, both freely and formally given by themselves, shall be so far removed from them; and such consent so given would essentially change the government—obliterate the republican form—and impress on it and fix in it another character.

THE RIGHT WAY

["Does this power of restoration not reside somewhere?" That is the question put, this 9th of November, by one of the most respectable and conservative journals in the United States. The question is pertinent and profound; and the purpose of these pages is, chiefly, to answer that the power *does* reside *somewhere*, but, alone, *in the Congress of the United States;* and that the President of the United States only had the authority, and, to this extent, only as the commander-in-chief of the army and the navy, to take the incipient step of fixing the times for electing members of the Congress, with the view, when such elections should be sanctioned by the Congress, but not until then, of retiring the military forces from these States. Says that journal, as all who favor the President's plan seem to think, "it matters not what we call the *means* the President may use to enforce it." It is just there the shoe pinches. The constitution appoints the *means* for the end, to wit, that *the Congress shall*, because the States in rebellion failed to, *fix the times and places for electing the members.* In the elections by the authority so given to hold them, the restoration, which is the end, would be reached. By any other means to restore these States, consistently with the system, as well might an attempt, call it what we might, be made by any soul to get to Heaven, consistently with the Christian's creed, without the use of the means divinely appointed to that blissful end.]

PETERSBURG, VA., MAY 16, 1865.

THIS is the gravest constitutional question that has accrued upon the North American experiment of self-government, since the rebellion of the colonies against the rule of the British King, in the success of which the system of *written constitutions,* with concurrent laws, had its origin. Though my argument may be dull, its subject—the observance of the laws—is of interest to society, so extensive that every member has a stake in it, either present or prospective. Though my discourse on every point may not be compact, it has cost me a labor which only earnest zeal would have encountered. The object was to discern through the laws what is just to be done.

Every citizen has the right, even under military rule, and should be allowed the liberty, if exercising it in the right tone and manner, to inquire into the conduct of the govern-

ment, and by argument to endeavor to correct it. If a fair exercise of that liberty is offensive to the governing power, and may be silenced and suppressed by it, in this country, then the noble experiment of self-government our fathers set on foot and gave a good prospect of success to, has ended already in a failure. The right spirit is not vituperative or frivolous; and whatever is either, ought to be suppressed, whilst the military rule is tolerated. Whatever is solemn, which implies that it is within the facts and enjoined by principles, and is intended to correct a wrong, ought to be indulged, and will be, unless they who are clothed with the limited authority of the system, are bent on abusing it, and exerting usurped power, permanently.

A close and generally accurate observer and a deep thinker has said: The people generally think and almost reverently believe that the men in authority use a great depth of thought and very much sagacity in their operations. The fact is, that, in all countries, the ministers of state seldom think but of providing for the present and usual contingencies. In doing that, they constantly follow the open beaten track before them, governed by precedents. This method does very well for the common course of human affairs, even is the safest; but whenever circumstances of a new nature arise, sad blunders occur, at least very often. Indeed, with us in these States, it is fortunately observable, and it will be very fortunate for the people, if the men in authority will be only faithful and diligent to observe, that the framers of our system have done the thinking for them, and defined their duty, even in unusual conjunctures. Action in *the right way,* is all that remains to be done.

There are some views, founded, I conscientiously believe, in everlasting truth, and closely appertaining to the passing conjuncture of the public affairs of this recently disturbed and not yet quite pacified country, which I have thought acceptable and desirable to be expressed and promulgated. By proposing them for publicity in this form, I am (but doing that which through much of my life I have done, that is) laboring for the public benefit.

When the Federal Union was formed, the gravest controverted question was, what amount of delegated authority its government should be clothed with. The representative men of that generation, who favored, and, as the federative plan progressed for uniting the colonies which had achieved their independence by a *rebellion* against the governing power of the mother country beyond the Atlantic, urged on a closer union, were called "federalists;" and other names, even that of "tories," were ascribed to their opposers. When the scheme had been instituted, and ever afterwards, from 1787 down to the year 1861, they who succeeded in instituting the government, as it was, by and under the constitution of the United States, assumed, or had ascribed to them, the party designation of "*Republicans;*" and the name of federalists which they had lost, was freely bestowed upon those who it was contended sought to gather to that government more and larger powers than the constitution intended, or could be fairly interpreted, to confer on the functionaries charged, in their co-ordinate relations, with administering it. The stout contest, in numberless elections, struggled on, never relenting, through three-quarters of a century, exhibiting its fierceness in nullification, in 1832, and in secession, in 1860-'61.* At no other period were the party ascerbities so subdued, as during the ad-

*The advocates of the disorganizing doctrine of secession, were long since and often and every where outweighed in argument, as they inferentially confessed by seeking to take shelter, as they alleged they might, in the reservation of the right by Virginia, when her convention ratified the federal constitution. They asserted that her reservation of the right enured to all the States. That was a mistake of theirs, in point of fact. Virginia made no such reservation. The language of "*the form of ratification*" was, as follows: "We, the Delegates of the people of Virginia, &c., &c., Do, in the name and in behalf of the people of Virginia, declare and make known that the powers granted under the constitution, being derived from *the people of the United States*, may be resumed by *them*, whensoever the same shall be perverted to their injury or oppression, and that every power not granted thereby remains with them and at their will."—Va. Debates, p. 469. It was not that the powers were granted by the several States and might be resumed by any State, at will. And Patrick Henry said, at the time, June, 1788: "The question turns, sir, on that poor little thing—*we, the people*, instead of the States of America." He said it was "an alarming transition, from a confederacy to a consolidated government."—p. 42. Yet it is true that many and large rights and powers were reserved to the States, and are still held to be inviolable.

ministration of MONROE, of which it has been said, that he found the federative edifice of his country's Union, as AUGUSTUS CÆSAR found his imperial city, built of brick, and left it re-built of marble. Previously, in 1806, with what design may never be fully developed, but suspected of hostile intentions against the United States, Colonel AARON BURR descended the Cumberland and Mississippi rivers, "with only a few unarmed men." This allusion is introduced mainly to preface the observation here, that from 1801 to 1809, that government was administered by President JEFFERSON, on the doctrine of *state-rights* and *popular interference*,* and for a distinct repulsion of the policy of the federalists. Again, in 1832-'3, with a deeper intensity, the struggle of the rights of the States against the powers of the General Government, stirred the public councils and the popular heart. The question dividing society, involved the duty of allegiance by the citizen, to the State, or to the United States. Did he owe that allegiance, in the disruptive issue of the contest, to the one or to the other. The citizens, on the one side or the other, could claim no ascendancy for the one set over the other, on the score of public intelligence, or private or public worth. The statesmen, on the one side or the other, could justly lay no claim to the pre-eminence, on the score of mental capacity, or other talents, or excellence of public service. The contest, for

*A sagacious writer, in 1838, wrote: "The doctrine of the sovereignty of the people, was nurtured in the townships in New England, until it took possession of the people of the State; every class was enlisted in its cause; battles were fought and victories obtained for it; until it became the law of laws." "Not a man in New England *is* to be found, who would acknowledge that the State has any right to interfere (in any township) with their local interests." Yet, they claim the right and exert the requisite brute force, through and by the general government, to interfere with our State's local interests. The population and territorial extent of our State as much exceed a township, as the State is exceeded by the United States under the general government. The same principles are no less *constituted* to protect the State than the township, against that interference. Indeed, the State is far more protected by the constitution of the general government, than is a township or a county protected by the constitution of the State government. The theory of the former is that all power not granted, is reserved to the States or to the people thereof; whereas the theory of the latter, is, that all power not reserved to the people, is granted to the government of the State.

aught the most virtuous and wisest could do, was, in 1861, reduced to the arbitrament of the sword. In this bloody trial of the issue, if those on one side can claim superiority, on one point; the other side may, on some other point. It would serve no purpose to the advantage of all, or probably of either, on the whole, to make the comparison; and it is *the advantage of all* which it is now most desirable to ascertain and advance. The battle is over, and the conflict of logic had gone before, and could find no end, until the theory of the State's right of secession, as claimed, was buried in the coercive power of the Federal Union. The question is, have the conquered suffered enough, or should they be subjected to pains and penalties for crime?* Suppose they of the other side, in the protracted and embittered contest of the statesman, the logician and the orator, with almost whole States and crowds of patriots supporting each side, had been overcome by the physical force of the army in the field—ought they of the other side to be by those of this, subjected to legal pains and penalties for their former persistency in the

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*So apt an illustration of my views, has lately been cited in the Petersburg *Index*, from the pages of ancient history, that I will insert it here, so that it shall have this record to assist in perpetuating the noble sentiment and rescuing this Christian Republic from the deep disgrace of more cruelty than the men of A.D. 161 were willing to practice. That instance of clemency was without the consideration and inducement to it, which I have herein urged, that one prominent cause of our recent war was found, on the part of many engaged in bringing it on, in a chronic controversy as to the existence of a right which many years and mighty men had struggled and failed to settle, until the sword was the only resort for a cure of the disease:

In the second century, an insurrection against the Roman authority broke out in Syria and the East, headed by a pretended descendant of the patriot Cassius, who had conspired against the mighty Cæsar. It ended in disaster and failure; and nothing seemed to be left but vengeance upon the adherents of the rebellion. Under such circumstances, here is the letter which the royal conqueror—the noble Antoninus Pius—wrote to the Roman Senate, and which deserves to be written in letters of gold upon the historic page:

"I beseech you, Conscript Fathers, not to punish the guilty with too much rigor. Let no one be put to death. Let the banished return to their country. I wish I could give back their lives to those who have died in this quarrel. Revenge is unworthy of an Emperor. You will pardon, therefore, the children of this Cassius, his son-in-law, and his wife. Let them live in safety—let them retain all that Cassius possessed—let them live in whatever place they choose, to be a monument of your clemency and mine."

Federal doctrine of coercion and denial of the doctrine of the State's right to secede? The question is asked, and will be left to the men in authority to be answered. It may be that it must be left to those who shall come after us, and whom the lapse of time, in after ages remote, shall impress with the knowledge and wisdom to sound the depths and ascend to the heights of the argument which that question involves. It will be wise, however, let it be suggested, that they who are charged with the duty, or the privilege, of solving it for the present, shall not be unmindful that the right of revolution is a doctrine of unalienable tenure, of which no free people will divest themselves, and no people can deprive their posterity. The people of the South are now quiescent, and they are giving multiform evidences of a cheerful willingness to be acquiescent, claiming only the right to assert that now, when hostilities are ended, they are a free people in a federation of States, each of which is entitled to a republican representative government. We, the people of the State, desire only that the improvided situation in which we are plunged, on a sudden, and from which the men in power profess a desire to extricate us, shall be relieved by a resort to the received maxims of civil liberty, the chief of which is the fairly ascertained consent of the governed. We wish all men every where to understand, that we are not made "of stuff" so flat and dull,

> "That we can let our beard be shook with danger,
> And think it pastime."——

It was said of Austria: "True, she had been conquered once, but it did not therefore follow that she should be conquered again." The South would not have been, nor could she be, if there had been, or should be, sufficient cause for war. God protects the right.

The meeting of "Conservative Union citizens," at Frankfort, Kentucky, Hon. Joseph R. Underwood, President, held the other day, takes the *right constitutional* view of the present aspects of the never-ending subject of negro-slavery—that is, *right* for any slave-holding State that was not in the rebellion

—yet, though right in principle, not wise to be insisted on, beyond a demand for *gradual* emancipation. Beyond that, the State would be isolated and impotent. That view, strictly observed before the war, would have accelerated emancipation, and might have prevented the war. The view is that the subject belonged absolutely and exclusively to the State and the people thereof. But the States in the rebellion made or accepted the issue at arms, and ought to abide the result. How far debtors who contracted debts on the faith of their slave property, and also innocent orphans and widows, in these States, may of right demand compensation, is a question not yet closed, nor can be, to the end of time, unless compensation be given those classes. It is conceded that such only of them should be paid, as shall show themselves guiltless of the attempted secession—guiltless, except by pretended "confederate" legal constraint from which they could not escape, when the Union could not protect them.

PETERSBURG, May 17, 1865.

Scarcely any other problem in the polities of this or any other country, in the past ages, is so difficult of solution as this, of the extent of the powers either relinquished by or remaining with the several States in the federal Union. Men as honest as sagacious, have discussed the complicated subject. They have failed to reach the same conclusions. One thing, however, is certain, for all concur in this, that the constitution of the Federal Union contains no provisions for its dissolution. Its framers *may have supposed* that it would be permanent and perpetual. As Philips says: "Troy thought so once; yet, the land of Priam lives only in song! Thebes thought so once; yet, her hundred gates have crumbled! * * * In his hurried march, Time has but looked at their imagined immortality," and all its vanities. Our fathers who founded our federative system, knew that the countries of Demosthenes and the Spartan, which Philips also depict

ed, had existed and passed away.* Then it is not likely they imagined the system they founded would never be subverted. Too knowing to believe it would never be subverted, they were induced, we must suppose, as were the founders of former systems, to provide no mode for its overthrow, for the reason that they foresaw it would be more difficult for their posterity to find out the mode by which it could be subverted, than it would be to resort to it, if it had been provided. I doubt the wisdom of their policy displayed in the failure to provide how the federation might be ended.† Stately as the fabric is, and stable as it was designed to be, and yet I wish it shall be, the posterity of its builders, so proximate as thus early, have already made an attempt to break it up. To the credit of this posterity, however, let it be observed and remembered, that whilst they renounced the *forms* of the Federal Union, they did not seek to expel the *principles* of civil, political or religious LIBERTY, on which it was founded by the original builders. In and by the recent

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* Since the text was written, the writer has re-read DE LOLME, on the English constitution, which he read first in 1826. That enlightened commentator quotes Montesquieu, thus: "Have not Rome, Lacedæmon, and Carthage perished? *The English government, also*, will perish when the legislative power shall have become more corrupt than the executive." Though, says De Lolme, I do by no means pretend that any human establishment can escape the fate to which we see everything in nature is subject, nor am so prejudiced by the sense I entertain of the great advantages of that government, as to reckon among them that of eternity, I will, however, observe, in general, that as it differs by its structure and resources from all those with which history makes us acquainted, so it cannot be said to be liable to the same dangers."

† A distinguished friend on reading the text, writes me: "That a nation should not provide for its own dissolution, is not wonderful; but that a mere *confederacy* should, is an act of ordinary foresight." That is just the idea expressed in the text—"how the *federation* might be ended." The difference of opinion then is not whether it would have been wise in the founders of the federal system to have provided, "as an act of ordinary foresight," some mode of dissolving it for sufficient cause; but the difference is whether the system they founded is constituted a *nation*—or is it a mere *confederacy*. To the foreign world, I admit, it is a nation. Of itself, disconnected with foreign relations, how obviously does it show itself not to be a nation, in the fact that it has not the power to regulate the right of suffrage by which the representatives from its component parts, the States, are elected to fill the federal councils? A nation without the power to elect the representatives to make or to execute its laws!

attempt at its formal renunciation, the men who started that attempt and prosecuted it with vigor, gave gallant attestation of their devotion to the principles and provisions of the federal constitution, which in the outset they incorporated in the constitution of the "Confederate" States. It is remarkable, and to the praise of the "Confederate" constitution, that it did not retain, but radically rejected the clause, and refused to insert any like it, by which the African Slave Trade was allowed for twenty years by a provision in the constitution of the federal Union. Judge by that fact, world of mankind, if the South desired to rob benighted Africa of her savage sons, even for civilized servitude. That gallant and vigorous attempt, so purged of the African slave trade, had so much prospect of success, that it involves a vast amount of damage. The work to be done, is to get the States that made the attempt, back into the harness, that each may pull and all pull together again.

The case now is that no manner of taking the fabric to pieces, whether into two or more, was provided, but an attempt has been made that has thrown some of its parts out of joint. The disjointing of its parts has done damages which all do, or should, desire to see repaired. It is desirable to ascertain what part of the damages can be repaired, and wisdom would seem certainly to dictate that such as cannot be mended, shall be contemplated, with patient resignation, if not forgotten altogether. A loss that cannot be replaced, must be borne. It is but natural that in rectifying any contrivance of human skill, the principles and the process of construction shall be consulted, no matter to what extent or how it was put out of sorts. Nor is it important to know when or by whom the disorder was produced. If it was done just now or long ago, by a wise man or a fool, by many or by few, with good or evil designs, the work in hand is to repair the injury, as far as possible, and, unless there is good cause for delay, to do it promptly. Whoever did the injury, can, whilst it is being repaired, or afterwards, be taken to account.

In the business now before us, that is, restoring the States to their practical relation to the Union, they still retaining

the theoretical, or constitutional, or if any prefer to call it, their *institutional*, connection, as no mode of dissolving it was provided by its founders, we may, with profit, inquire whether there is any mode to be found in the principles on which it was constructed, by which it could have been dissolved, as to the whole of its constituent members, or any of them, without the damage the wrong attempt has wrought. By finding out how it might have been dissolved, we will discover the principles by which it may be reinstated in its practical working. It is believed, and will be taken for granted, as if agreed by all, that the main fundamental principle—the mud sill—of the fabric, was that the majority shall govern. However that principle is departed from in any or however many special cases, there is the fulcrum after all, on which the lever of the republican creed is established and turns to the sweep of the popular sovereignty. Though the plurality rule prevails in special cases, it is exceptional, and in every case it is only to escape greater inconvenience. It partakes of the principle of the majority, for *it is more* than any other. Though the special prescription that two-thirds or three-fourths, or the whole body with unanimity, may or must decide, sometimes prevails, it is for the protection of popular sovereignty, and is invariably a restraint on the authority of the people's representatives, and almost always intended to give sability to the people's institutions, as they have established them. All such prescriptions are strictly in unison with the early teaching of the fathers of the system, that existing forms shall "not be changed for light and transient causes." It will be perceived that the observation is pertinent here, that the States ratified and established the federal constitution, no less to secure the blessings of LIBERTY *for their posterity*, than to form a more perfect Union. It should not be lost sight of, that in starting the mode of dismemberment, which has failed, the disaffected States, be it repeated, did not reject the principles of the federal constitution, but their attempt was to renounce only the forms of the federal Union.

Now let us apply the principle that the majority shall govern, to find, if we can, whether there is any peaceful mode,

as the federal union was not likely to exist forever, by which it might have been, *or may be for cause*, dismembered. The way by which it was established, must be searched, and the facts so ascertained will materially assist us and reconcile us to the conclusion we will arrive at. The two most important facts we cannot fail to find by the retrospection, are, first, that the States, severally, each for itself alone, ratified that constitution; and, second, that the States which came into the Union after it was formed by the first nine that ratified it, did not *accede* to the Union, as of right, but were *admitted* into it. The authority was in the States already in the Union, to reject the application of any State seeking the admission. If any *acceded*, they were the four last which ratified the constitution, after the Union was formed by the ratification of the other nine. All the States since have been *admitted*, certainly. How has each State been admitted? The archives show, by the votes of a majority of the States in the Union, at the several times of each new State's admission. The light shed by these facts, guides safely to the conclusion, that no State can dissolve its connection so formed, in any other way than by the consent of the majority of the States in the Union, at the time any one desires to go out. By analogy to its application to be admitted, it ought to apply for the consent of the other States to let it go out; which consent, by the same analogy, the majority of the others might give. In default of the formal application to retire, the chief executive authority ought, as Jackson and Lincoln did, to issue the proclamation of warning to the insurgent State. But yet, the federal government is not charged with the duty of making war on a State in the Union, *nor has it any such authority*, and the resisting State is not yet out. Therefore, that government ought to supply the neglect of the State to apply for permission to withdraw. This neglect could and should be supplied by a simultaneous proclamation by the President, to the other States, to hold conventions, severally, and to advise him, authoritatively, each State for itself, whether the people thereof will consent to the withdrawal of the disaffected State. If the majority so signify their willingness, the disaffected one

would go out in peace. That would no more destroy the life of the nation, than the loss of a limb destroys a man's life. The nation would survive a loss of any number of the co-States, less than a majority of them all. The pathetic appeal to the people of the North, to save the life of the nation, was a deception.

That is just exactly the doctrine embraced in "the form of ratification" of the constitution which was reported by Governor Randolph, in the Virginia convention, and adopted, on the 25th of June, 1788, and which has been so often misinterpreted and misjudged by the secessionists to be in support of their creed. On that form of ratification, they relied as showing that Virginia reserved that right, and that her reservation thereof enured to each of the other States. The language of that form is: "We, the delegates of the people of Virginia, &c., declare that the powers granted under the constitution, *being derived from the people of the United States* may be resumed by *them*, whenever perverted to their oppression; and that every power not granted remains with *them* and at *their* will." Surely, that means, not at the *will* of the people of Virginia, but of the United States; and to be resumed by whom? and when? Why, clearly, not by the people of Virginia, but of the United States, when oppressively used, and so used by whom? Not by the people of the United States, but by *the constituted authorities;* and this is shown most unequivocally by the next clause in that form of ratification which has been misquoted and misapplied for more than three quarters of a century. That next clause is—*and* "therefore no right of any denomination, can be cancelled, abridged or modified, by the Congress, by the Senate or House of Representatives acting in any capacity, by the President or any department or officer of the United States, except in those instances in which power is given by the constitution for those purposes;" &c. That demonstrates that the oppression deprecated was guarded against as likely to come, not from the people of the United States, but from the constituted authorities; and in this case it was declared that the granted powers might be resumed by the people of the United States.

And the question recurs, *how* in such case resumed? It is obvious, the right to secede not being reserved, the granted powers could in no other way be peacefully resumed, except by a majority of the people of the United States acting by States.

In the light of *that*, which is the only peaceable mode of dissolving the federal Union, it will be seen that the States which lately attempted to withdraw, were in fault, but not more in fault than the government of the Union was derelict to its duty and peaceful privilege. If the dissatisfied States were in fault in not making formal application for the consent of the other States; so were the authorities of the Union in fault for not applying to the satisfied States to signify their consent to the disruption. But suppose the loyal States dissent? In this case, time will have been gained for reflection —which might be all that was necessary to secure a reconciliation. Suppose the disaffection remains, when the dissent of the co-States is ascertained. The arbitrament of war is still accessible, if it must come. That there should not be, nor indeed can be, any necessity for war, is as clear and absolutely certain as that the civil administration of the government of the Union, could be shaped so as to be as coercive upon any State or set of States gone out, to make them come back into the Union, as the fiercest war with deadly arms. If a resort to the coercive energy of the civil power, is not preferable to war for "preserving the Union, when a State (or several) has become dissatisfied with the government," then there yet remains, in this nineteenth century of the Christian age, the deplorable alternative of a return to the usages of savage life, to sustain civilized society. In any crisis, and at all hazards, an attempt should be made, with persistent vigor, to escape that return. Tell me not, that there is less savageness in the shell thrown from afar, than in the club wielded at hand. Tell me not, that man must remain as he was, nay, as he is, and not become as Christ intended he shall be. We boast an advance beyond the nations that exist, or any this has survived, and our boast is vain and vicious, if it be not true that a return to savage usages is not

needful, but is despicable. There is less danger that the landmarks of liberty will be obliterated by the milder exercise of the civil power coercively, than by the frightful and unchristian demonstrations of the war power. So much is enough to indicate how peace be may maintained and the Union reassured on any future occasion of a threatened disruption, or of one actually occurred.

The highest duty of man to his fellow-intelligences, pleads trumpet-tongued against a resort to arms. It demands a resort to the civil authority, to the utmost measure of its capacity to coerce peace between the States, in preference to war to conquer a peace. That highest duty of man to man, is by all possible means to avoid the destruction of human life. Our system, especially and pre-eminently, utters forth that demand. It has its fountains and all the channels of its flow, in Friendship, Patriotism, and Humanity. The waste of human existence is not among the objects to accomplish which man is gifted with next to omnipotent powers. It is not the impulse or the purpose of our system. It should be shunned,

> "The rolling waves, the sun's unwearied course,
> The elements and seasons, all declare
> For what the Eternal Maker has ordain'd
> The powers of man: we feel within ourselves
> His energy divine: He tells the heart
> He meant to make us to behold and love
> What He beholds and loves, the general orb
> Of life and being."

Our system in its theory, is in full accord with the poet's noble and just expressions, and its practice cannot be in harmony, unless it abhor and avoid war.

The application of these views to the solution of the present situation, is plain and easy. The lately disaffected States and the coercive government of the Union having both been in default—the disaffected States having been overcome by "overwhelming numbers and resources," and having suffered a spoliation of nearly all their affluence, and the slaughter of the flower of their youth, and of the vigor of their manhood —and the Union having been triumphant thoroughly, though tardily—let the one return to the Union and enjoy the bless-

ings of liberty the constitution promises, and the other display the benignity that befits the conqueror, especially one occupying the vantage ground of such superior resources. The principle that the majority shall govern, strictly applies in restoring the recently disaffected but now reconciled States. That principle can best be displayed in the passage by the Congress of *an enabling act of amnesty*. This plan would diffuse its genial warmth thoughout the States, and tinge the whole horizon with its radiance.

PETERSBURG, VA., MAY 18, 1865.

My last letter suggests that the States lately "in rebellion," so to designate them, shall be restored to their "practical relation" in the Union (as President Lincoln very correctly designated the proposed operation) by an enabling act of amnesty. The difficulty of selecting the right way of doing the thing, is perplexing indeed, owing to the complexity of the federative system. President Lincoln was not fully satisfied with the mode he proposed, in his Amnesty Proclamation, 8th December, 1863. He generously confessed that the operation was difficult, and that it might be that his plan was not the best. He suggested the best he could with his (then) present impressions, and declared that "it must not be understood that no other possible mode would be acceptable."

Let it be noticed that the social compact of the State is not dissolved. The people of the State are not thrown back into a state of nature. Nor is the constitutional compact of this State with the others in federal union, dissolved. The question, therefore, is (not one of abstract expediency, how the State shall be restored, but) one of constitutional power and obligation. It is a question of legal right. The framing timbers of the State's structure are all in their proper places, in their sockets. It is only the weather-boarding and interior finish that are stript off. If any like the simile better, the State is a skeleton, needing to be reclothed with flesh and blood. All its offices still exist, and only need to be filled.

The State is now under military rule. It is in the condition, strictly, of a conquered province; but the purpose is to re-establish civil government. This is the design avowed by the men in the federal authority, to be intended by them, *and* to be accomplished in "the republican form," as the constitution enjoins. This State (and each of the others) has a constitution and a code of laws of its own, which were in force before "the rebellion." Each State and the people thereof had "rights reserved," which the federal authority cannot touch, without subverting the system. Each, for instance, has the reserved right to regulate suffrage in the popular elections. Each has its criminal code. Scarcely any State has in its constitution any provision in conflict with the federal power; and if any has, it is subject to be overruled by the federal authorities. These and kindred observations might be enlarged the length of a volume. Very much, then, in restoring the State remains; and yet much needs to be altered. Owing to the delinquency in which the States have been caught, they must be clothed with newness of life. Whatever there is in the existing forms of the State, that is incompatible with the objects of the federal power in its success in "crushing the rebellion," may be obliterated; and should be, if rightly done; and whatever is not incompatible with the success of that power, needs to be revived, because the rebellion *suspended* the whole. How can this be done? is the question. I repeat, by *an enabling act of amnesty*. The provisions of such act to extend pardon, must be to this extent, at least, that the State, as a body politic, shall be relieved of the incapacity which by its delinquency it has incurred; and its enabling provisions must prescribe that the State may, and when it shall, elect its representatives and senators to the United States Congress.

This plan for restoring the lately disaffected States, to their practical relations in the federal Union, is deduced from the first clause of the forth section of the first article of the constitution of the United States; and it is justified by the analogies to be drawn from the admission of a State from the territorial condition, and of a State acquired by purchase, as

Louisiana was, or by conquest, as Texas was. In each case, an enabling act was passed by Congress, either previously to or presently with the admission of the new State. It is true that, in one sense, these States lately disaffected, and now sought to be reconciled, were at no time out of the Union. The States which remained loyal did not, any of them, consent that the others or any of these might retire. They were out of the Union in the sense that they sought to be. They were still in it, in the sense of the dissent of all the others which persistently made a struggle to make good that dissent which is so significant in the result. If the State was not out of the Union, the government of the Union had no authority to make war on the State; and if the State was out, when the war was made, its citizens are not chargeable with treason. The Federal authorities conceded that the confederates were a belligerent power. It is clearly diallowed by sound principles of law, as it is repelled by all respectable morality, that the State shall be held to have been out of the Union for war purposes, and still to be remaining in for any purpose of accountability on criminal charges against the citizens, now when the war is ended.

The ideas prevailing on this point, whether these States are in the Union or out, are conflicting and confused; and also, if in, for what purposes they are in. That they are in, now, in some sense, since the rebellion has ceased, is not questioned. Whether they were out, in any or what sense, during the rebellion, is not now so important. That they are now in, *on an equal footing* with the States not in the rebellion, but which resisted it, is contradicted by those who assert that claim of equality. The contradiction is manifest in this that they who assert that equality, are contending that the President has the authority to appoint provisional governors for the States in question. That these States are without governors, when each had one acting, shows that they are not practically in the Union, and therefore are not in on an equal footing with the others: and that they may, by any means, be supplied with governors, show that though *practically out* of the Union, they are still *in theoretically*. If they are out in theory, the President has

no power to take them in, in practice; and if they are practically in, he has no power to appoint their governors. His duty to take care that the laws shall be executed, confers on him no authority to make a law or to appoint a public officer.

Then it would seem to be just and proper that these States, having failed to maintain the doctrine of secession, and being compelled to retain the federal relation, should not be deprived of any rights they had before the struggle; *excepting* only such rights, whatever these were, as, by their existence, gave origin and progress to the struggle. Of these contested rights, there were but two, to wit: secession of right, and the right of property in negro slaves. This right of property, whatever extent of precipitate disruption it may attain unto, or how many masters may consent never again to exercise it, remains as yet in its constitutional and adjudicated legal sanctions; and the right of secession, it would seem, will never again be claimed, unless by such (to use Milton's figure) as would "ride the air in whirlwind, and make such wild uproar as hell scarcely could hold." It does not appear that these States have lost any other rights—the right to regulate the right of suffrage,* for instance, or the rights of legislation and judicature—or the right to be represented in the federal councils. Each State

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*"A power," that is truly, as President Johnson justly declares in his Proclamation appointing a Governor *ad interim* for North Carolina, which "the people of the several States composing the Federal Union, have righteously exercised from the origin of the government to the present time." Upon that just and dignified concession, not less happily expressed than conceived, the question arises, *why* should not other landmarks of our constitutional republican political freedom, that are equally obvious, righteous and honored, be equally observed? Why not?

Not only is it true that the Congress has no authority to interfere in the matter of suffrage in the States, but it is so on the soundest views. The authority could only be falsely claimed by inference from that provision of the Federal Constitution, which guarantees to each State the republican form. This is a far-reaching authority, but if it extends to the regulation of suffrage, it would equally embrace and confer power on the Congress to interfere with the judicial tenure, and on the pretence that during good behavior, or for a tenure of seven or more years, is too loose, or too long, to be recognized as being republican. Besides, there is no limit to the federal power, if the doctrine is to prevail that it embraces whatever facility or function is not prohibited. The right rule, the only effective limitation, is, that the claim of any power must be shown to have a firm footing in a clear grant.

retains the right to elect its legislators, and its judicial and executive officers. This right is only in abeyance; not abrogated. Then, when released from military rule, who, but herself, can appoint the Governor? Whilst under military rule, who has any power to appoint the civil officers of the State? No power which the States granted to the Union, invests it, or either of its co-ordinate departments, with any actual authority, or the semblance of any, to appoint a Governor.* The State is ascertained, *by force of arms,* to be delinquent to a loyal organization at home, and the practical domestic organization is *forfeited,* as far as it was formed whilst the State was in the delinquency. So much of the organization as existed before the war, is only *suspended.* By the failure to maintain a loyal domestic organization, the State was thrown out of its practical relation to the government of the Union. The frame of the State's organization is still subsisting, as it existed before the war. That *fourth* section of the *first* article of the Constitution, sheds all the light needed to show how the State shall be restored to its rights in the Union. It prescribes that each State may appoint the times, places and manner of holding elections for senators and representatives, *but the Congress may at any time, by law, make or alter such regulations, except* as to the places of choosing senators.† The present is just exactly

*This absence of power in the President to appoint a Governor of a State, is one of the chief excellences of the Anglo-American system, and most valuably distinguishes it from the constitutional monarchies in the old world. This did not escape the observation of the enlightened *Detocqueville*, who in his "Democracy in America," says: "In the exercise of the executive power, the President of the United States, is constantly subject to a jealous scrutiny. He may make, but he cannot conclude, a treaty; he may designate, but *he cannot appoint, a public officer.* The King of France is absolute" (whereas the President is merely the chief agent) "in the sphere of the executive power."

† The writer has to-day, (11th Sept., 1865,) for the first time, examined a debate in Congress, which occurred on 21st Aug., 1789, on an amendment, at that time proposed by Mr. Burke, of S. C., to be made to the Constitution of the United States, in regard to this power of Congress given that body, by IV. Sec. of I. Article. The proposed amendment was to the effect of restricting that power, and it was urged by the advocates of the amendment, that the States should have exclusive authority to regulate their own elections. It was insisted on by Mr. Smith, of South Carolina, that the amendment offered by his colleague, would not prevent any exercise of the power as given by the fourth section, in any case of a State's neglect

a conjuncture in which the Congress may appropriately exercise the power. The State has failed, in forfeiting its right by its delinquency, to elect the proper officers to administer its government. Now, then, if the government of the Union is desirous that the State shall be restored, let that government indicate how the people of the State shall be purged of the impurity of secession, and be restored to the loyal relation of practical activity in the Union. To do that, the Congress may prescribe by law the times for choosing its senators and representatives. This, however, the State cannot do, until that government shall have set a time for making those elections; for, until that is done, the State cannot elect a Legislature, by whom the constitution requires those senators shall be chosen. As soon as the State is advised that the two Senators may be sent up and admitted to the seats, the State can and will proceed to elect the Legislature, and this election will be made according to the laws of the State, except so far only as the people of the State have incurred any disabilities by reason of its recent delinquency. The disability of the State, as a corporate body, will have been removed by the enabling act authorizing the State to renew its representation in the Congress. *Or*, the Congress not being in session, the President might, as Commander-in-Chief, order the election. This is the aptest mode of change from the military to the civil rule.* The disability of the in-

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or refusal to make provision for the Congressional election. Mr. Goodhue regarded the power given by the constitution to the Congress to alter or make the regulations, at any time, by law, as being *necessary to the existence of the Federal Government.* Mr. Madison "was willing to make every amendment that was required by the States, which did not tend to destroy the principles and efficiency of the constitution. He conceived that the proposed amendment" (which only sought to *restrict* the power of Congress) "would have that tendency; and he was, therefore, opposed to *the amendment.*" Yet, now, it is claimed that the President of the United States, in his capacity of the chief executive *civil* magistrate of the United States, may so far neglect that IV. Sec., I. Article, as to exercise the authority, so, by cotemporaneous interpretation, ascertained to be confided exclusively to the Congress! Fatal neglect it will be if persisted in.

* The observations in this expositive note, are important to be considered, as showing that this step, as every other, of the plan, is founded on express provisions of the Constitution United States. The President is Commander-in-Chief of the Army and Navy of the United States, by Art. II., Sec. II., Clause 1. Each State in, or in-

dividual citizens will remain to be adjusted. The question recurs: Who can assign the qualifications of the State's electors, or derogate from the State's assignment of capacity to any citizen to be elected? How many and which that were inculpated, by common fame or notorious acts, in the State's delinquency, are to be disqualified, and by what authority?

There is one point in those important practical questions, about which, it would seem, there can be no dispute. It is that no one shall exercise the right of suffrage or fill any office, unless and until he take the oath of federal allegiance. This is a *sine qua non*. Every man intending to continue to reside in any State, ought to be willing to do that in good faith. Can that government require of the individual citizens anything beyond that, to qualify them to be electors or to be capable of being elected?

When the State shall have been authorized to renew the election of representatives and senators to the Congress, all else that is requisite to restore the State to the practical working in the federal scheme, will follow as natural consequences. That authority would imply the duty of the State to proceed at once to elect a Legislature, and a Governor, and the Judges —a Legislature, because that body is charged with the election of Senators to the Congress—and a Governor and the Judges, because the executive and judicial functions are a part of the State's organization. The authority to renew her representation in the Congress, would also imply amnesty or pardon to

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tending to be in, practical co-operation in support of the supreme federal authority, is entitled to "the republican form," as pointed out in the preface. Art. IV., Sec. IV. By Art. II., Sec. III., the President is charged with the high function of "taking care that the laws be faithfully executed." The enforcement of the republican form, during the recess of the Congress, is thus clearly devolved on the President, but he should take care that every step he takes, is within the authority of the laws of which the constitution is the chief. There is no provision of any law, organic or ordinary, which gives or implies authority to him to appoint a civil Governor of a State, when the civil government thereof has been suspended by a rebellion or interrupted otherwise, and is under military rule. Yet, he has authority, and it is his duty, to take care that the State be promptly relieved of the military rule that has supervened, and this he can do in the recess of the Congress, only by fixing the times and places by military orders for electing the civil officers of whom the Governor is the chief in our republican forms.

the State; but that would not convey a pardon to any of the citizens, in their individual relation, who compose the State. Whatever may be the punishment for any of them, held in reserve, would not be hindered by the execution of this plan for restoring the State. This plan carries, as one of its characteristics, a deference to the judicial power of the Federal Government, which, it may be demonstrated, must first ascertain whether *any citizen* is an "*offender*," before any federal legislative or executive authority may lawfully interpose a pardon in his behalf. The judiciary is co-ordinate. The court has independent and exclusive, but not conclusive, cognizance of the case when it has arisen under the laws in force. The Congress has power to repeal a law, but is powerless to snatch the accused from a regular trial according to law. Nor can the President prevent the trial. Should the Congress attempt to authorize him to do so, it would be legislative usurpation. The accused, when convicted, can be pardoned by the President. The decision of the Supreme Court in the case of *the United States vs. Wilson*, 7 Cranch, is not at all inconsistent with the view here taken. This view is sustained by the tenor of Secretary Seward's instructions to Mr. Dayton, Minister to France, to the effect that the President's action (in the given case, as in any other) can be overruled by the judicial authority, even though that action be assented to by the Congress or by any mode or extent of the popular concurrence. And it should be so. "The judicial power," as an eminent writer remarks, "is the only sure criterion of the goodness of a government."

The Congress, or, it may be as clearly, the President of the United States, might issue an amnesty to the State—the State not being amenable to the judicial authority, or capable of a criminal offence. This question and the like of it, are avoided by this plan for restoring the State, (at least until after the State shall have been restored,) simply by authorizing her to elect her representatives to the Congress, and by which alone the regular action of the State can and would be superinduced as a natural consequence. Nor would the execution of this plan at all interfere with the purposes of the General Government with respect to the free people of color, whatever those

purposes may be consistently with the received doctrine that the regulation of suffrage belongs to the State.

The only thing now remaining to be suggested to show that this plan is practicable at all points, and would be eminently practical, is to indicate by what authority the State would proceed, by the qualified voters, to elect the members of the General Assembly—that is, delegates and senators to compose the State Legislature. This, it seems to me, is also quite plain, if it be necessary. The State is now under military rule. The President of the United States is the Commander-in-Chief. Let him, as such, order his subordinates in command of the forces in this State, to appoint a time for the election of the State Legislature and other officers, and direct that after the election the civil power of the State shall be in action, and that the military be withdrawn, so far as its presence would hinder any regular exercise of any civil office. So, in each State.

The object of more lasting benefit than to serve the existing exigency, important as this is, is to bring back the public councils to look into the constitution for remedies to correct irregularities in our system of political freedom. If the correction of a departure from the system, as this system is framed by written constitutions, may be found outside of the constitution, and though inconsistent with its principles, may be applied by the men in authority, how and why shall *they* be held culpable who by attempted secession deflected the system from the regular working? If the opposers of secession, (of whom the author of these fugitive pages was one,) may look for and find a remedy which does not turn on the provisions of the constitution, for any supposed or real grievance, what right have they to *complain*, even, that they who threw the system off its hinges and out of the harness, had resorted to acts of secession that are outside of the constitution? Is it that some of the States must, and others may not, respect the constitution and be governed by it? The idea that one wrong may be done to correct another, is not any more sanctioned by our laws, than it is sound in morals. Why may they in authority who do not obey the laws exact

allegiance of those who are not in authority? Illustrious lesson of liberty this is, that "in the exercise of his powers of government, the President of the United States, is no more than a magistrate; and the laws, whether those that existed before him, or those to which, by his assent, he has given being, must direct *his* conduct,and bind *him* equally with his fellow-citizens. It is the *government,* as it is defined by written constitutions, which all, in and out of authority, are sworn to support. As De Lolme expresses it, "there may be an immense distance between the making of the laws and the observing of them." The government is one thing—its administration is another, and may be very different. The oath to support the constitution, *is an oath to resist tyranny and to rebel against persistent usurpations and oppression.* It is not any *administration* of government, to which the public councils may deflect its powers from the line the government prescribes, that the citizens in private life are bound to obey and cherish. The administration derives its honor from its dutiful observance of the government, and from that orbit alone can it shed the beneficence of the government. If the government is found to be less perfect than it should be, let its defects be supplied only by a resort to the power of the people that created and established it. If the administration is vicious, that is, in departures from its appropriate sphere, let it be reclaimed by fair speech, and the power of argument, and the elective suffrage, and the right of the people to instruct the representatives whom they elected. The sentiment of the poet applies as well to the administration, as to the man who owes allegiance to the government:

> "On him who lives as wisdom would require,
> As duty woos, and as the virtues claim,
> Time, if it robs the poet of his lyre,
> Bestows a bliss beyond the wealth of fame."

The constitution is the gospel of that wisdom; and it is the virtue that drives them who administer it, to the duty of observing it, which bestows the honor of enduring value.

PETERSBURG, VA., June 5, 1865.

Repeated in other words, with a few other thoughts.

If the United States authorities are in earnest and sincere in their avowed purpose of re-establishing the legal rule of a regular civil government in this State, the plan is conspicuous in the provisions of the constitution of the United States. If it is the purpose, however, of that government to experiment longer, as General Sherman expresses it, in the machinery by which its power is to be displayed in the South, this purpose is equally conspicuous, and so much so, in the hindrances which are in the tide of experiment, that it will be difficult for the authorities to discover a better mode than that they are practising. The military authorities, in this city and elsewhere, as far as I have observed, are exempt from this animadversion. These are doing the best for us their orders will allow, and the men in civil office seem to have right disposition, but they do not adopt *the right way.*

Let the authorities at Washington consult the situation, and be governed by the constitution, and the right plan is on the surface; and if adopted, will bring relief to us, and to themselves the assurance of that prosperity which the agricultural and other industrial pursuits prosecuted with all practicable vigor, alone can reproduce. One act will do the work. Without that act *first* accomplished, the pending troubles will drag their slow length along, until, it is to be feared, great as they are, still deeper and more difficult will be engendered. Whilst there is danger that delay to bring in permanent government, may breed troubles of one sort or another, yet the mere element of time, within the compass of a year or two, is of inconsiderable value. The State can get on tolerably under military rule or a forced provisional government. And let it be perceived that this plan applies to every one of the late so-called Confederate States. That requisite act first to be done to accomplish the desirable object of restoring the State to the former practical relations in the federal union, with least possible delay, is simply that the federal authorities shall authorize the State to renew her representation in the Congress.

The State is now without that representation, and she has no legislature which alone can choose and send up two Senators to that Congress. (See Art. I., Sec. III., cl. 1 Con. U. S.) The authority to the State to do that, would imply that the State shall proceed to elect a Legislature. There is, in the situation, as it is, no time appointed for the election of the representatives of the State to the Congress. As the State has failed to prescribe a time, the Congress has the authority to do it. That authority is conferred by Art. I., Sec. IV., cl. 1, Con. U. S. And here the only question of any possible difficulty arises. It is, *how is the time for electing a Legislature to be appointed, and by whom?* The answer here, too, is on the surface, but it extends itself to and through all the depths of the subject. Excluding the Peirpoint government, (which I would advise all to help on to success, as provisional,) the State is under the military rule. The President is commander-in-chief. Then, let him issue an order to the proper military authority within and throughout the State, to fix a time for the election of Delegates and Senators to the General Assembly, according to the suffrage (with the qualification of new allegiance) as it was regulated by the constitution before the war. That would prevent the delay for the Congress to meet. The constitution of Virginia, although its operation was practically suspended by "the Ordnance of Secession," has not been disannulled; but, on the contrary, it is in the theoretical structure of the federal union, still *potential*, that is, existing still in the capabilities of a practical exercise. Its pro-slavery provisions are, by the result of the war, deadened; and by the universal acquiescence of the owners of the hitherto lawful property, those provisions are utterly annihilated. The only qualification on the right of suffrage that needs to be added, is the just requirement that the citizens, before voting, shall have taken the prescribed oath of allegiance. That super-addition of qualification to entitle the citizen to suffrage, is *just*, from the fact that the State, as an organized society, attempted to secede and is baffled. The individual citizens are found in that delinquency or disqualification. They, now, as individuals, desire the benefit of a renewal of represen-

tation, and they should by oath reclothe themselves, each for himself, with the former allegiance, or submit to a denial of the desired benefit. The general government has no authority to require any other test oath.

Whatever else is done, and however long it may take to do all else that may need to be done, the State's representation in the Congress must be renewed before the State can be restored. When *that*, which is most important and indispensable, is done, all else will flow on by natural consequences. The State *so officered*, would alter—would at once be *constrained* to conform—the municipal law, to suit the changed relations of the colored people. If desirable, at any time after the State is restored, and no matter why desired, to have a convention to change the constitution, in any respect, or however soon thereafter, it could be done with more deliberation, and be better done, in all respects, after, than before, the event of the practical restoration. Nor would the punishment of individuals, whatever that may be, in reserve for any, be embarrassed by the execution of this plan. The authority of the State as an organized society, would imply an amnesty to *it*, as such, but would not impart any pardon to any of the members of that society. It is competent to the federal Congress and executive, the latter acting as a component part of the federal Legislature, to issue that authority necessarily implying amnesty or pardon to the State, because the State has the reserved right of "the republican form" which the General Government is bound by the constitution (Art. IV., Sec IV.,) to guarantee to every State in this Union. That guarantee cannot be made good to any State, under the federative system, as it was, or as, it is supposed, it is intended to be, unless and until the State is authorized to renew the representation in the Congress, which the state has lost the opportunity to do at present, by the failure to appoint a time for the elections. The State needs not, nor indeed can, be held subject to any punishment that may be in reserve for offenders; because the constitution of the union provides no punishment for the State, nor any fundamental forfeiture. Nor does principle prescribe any. It is otherwise with the individuals of the organized

society, called a State (and, by-the-by, a State without rights, would be a nondescript). The individual members are liable to punishment, as *offenders;* but whether any are offenders in a criminal sense, and whether that is given in charge to the judicial power, which is a co-ordinate department, to ascertain, exclusively of any interference by the federal Legislature and Executive, until after judicial coviction, are questions of grave import involving elements of controversy enough to be postponed, until they must be decided. The other question of the right and (it seems to me) the only way of restoring the State, is upon us and craves to be first settled. "Sufficient unto the day is the evil thereof;" and it is an evil, in this instance, that may become inveterate, if the cure herein suggested, be neglected.

How inconsiderate, not to say how immoral, it is, that publications shall be spread over the popular mind that it is indifferent how the States are got back into the Union, cannot fail to be seen in the light of an illustration that will be offered in conclusion of this article to enforce the right way. It is agreed by the men in the federal authority that these States are not to be held as conquered provinces, but are to be recharged with federal duty and replenished with the federal privileges. That is just the *status* of a territorial people in the act of forming their institutions for admission into the Union. If it is not material, but indifferent, whether the federal government shall see to it that the new State shall come in in no other than the republican form, then it matters not what means are used to restore these States to membership in the Union. If the constitution be not observed in this transaction, the historian who shall record the events by which our federal system will have been brought to its end, will devote his first chapter to the unconstitutional restoration of the rebel States in 1865.

PERERSBURG, June 17th, 1865.

The Wheeling and Alexandria Constitutions.

As the records show, the case of Virginia, is thus in the outline of the projected partition into two States: On the 11th

of June, 1861, a convention of delegates from thirty-nine counties remaining loyal to the federal Union, was assembled in Wheeling. On the 19th, an ordinance was passed "for the reorganization of the State government," to extend over the whole State. On the 9th of August, an ordinance was passed declaring the ordinance of secession, passed on the 17th of April, at Richmond, to have been "without the authority of the people of Virginia," in the face of the fact that the whole State was represented in the Richmond convention. On the 20th of August, the Wheeling convention ordained that a new State should be formed including the thirty-nine counties, to be called "the State of Kanawha." On the same day, 20th of August, 1861, they passed another ordinance providing for the election of members to the Congress, from the whole State of Virginia. On the 13th of May, 1862, the legislature at Wheeling passed an act professing to give the consent of "the Legislature of Virginia" to the formation of the new State of West Virginia to comprise forty-eight of the counties of the State of Virginia; and this new State was admitted into the Union by the Congress. On the 13th of Febauary, 1864, a convention of Delegates from half dozen counties about Alexandria, assembled in that city and issued a constitution, as if it were an edict by a prince to his subjects, and now claim that it shall be extended over this part of the State; and the President of the United States promises the federal army, if necessary, to enforce it. If that was right, a third, without delegated authority, may assume to act for the whole, and a small portion of that third can subject the other two thirds to their rule. The Congress refused to admit, that is, *did not admit*, to seats the men who were elected under the Alexandria constitution, to serve as Senators from that fraction of the third of the old State. Why were *they* refused seats in the United States Senate?—Nor is that all. It is claimed by the authorities at Washington, that the Virginia Ordinance of Secession which incited to the formation of the Wheeling government, (and most properly was it formed, if it had been provisional only during the war,) did not carry the whole State, or any part of it, out of the Union. This is

true, and is not now questioned by argument or arms. With this just demand enforced, to wit, that the whole State was all the time of the war, still in the Union, how can it be maintained by the federal authority that the new State was constitutionally carved out of the old State, without the consent of a Legislature representing the whole State? The provision of the constitution of the United States, is: Art. IV., Sec. III., cl. I. "New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned, as well as of the Congress."

Such being the facts constituting the situation of Virginia, and it being also a fact that the United States authorities do not intend to impose an immorality on the citizens in East Virginia, the question arises, how can any citizen take the oath to support both the Constitution of the United States, and the Wheeling arrangement? I am a sincere and loyal inquirer for the truth. No man is a warmer admirer of the Federal Union, from affection for its principles and veneration for its felicitous provisions. Having most cheerfully taken the oath to support the Constitution of the United States, I am anxious to take the oath to the government of the State, as it ought, instead of as it is sought, to be established. The one constitution is in conflict with the doctrines on which the other is founded. The great and most admirable principle that the government of the United States derives its just powers from the consent of the governed, is rejected by the exaction of the oath to support the Alexandria Constitution, to which at least, seven-tenths of the voters to become qualified as such by the just exaction of a new oath of allegiance to the Federal Government, had not given, nor had any opportunity to give, their consent before it was extended over them. Nor was it the fault of very many of these citizens that they never had an opportunity to vote to ratify or reject it. The opportunity was withheld from most of us by causes we could not control, and one of which only needs to be mentioned in support of

the argument against the permanent expansion of the authority of the Alexandria Constitution. It was intended by its framers, that the people of the larger part of the State represented in the General Assembly, at Richmond, should not have any voice in determining its acceptability. It was properly intended to protect, *during the war*, the people of that portion of the State, whose delegates in convention framed it; and it had done its full legitimate service, when the war was ended. Or, if now it is meant that it shall survive, and that its authority shall be spread, as a mantle, over this larger part of the State, it can only be rightfully done, consistently with our system, by submitting the question of its ratification or rejection, to the vote of the whole State. The enlargement of suffrage, by removing some of the disqualifications the Alexandria constitution prescribes, would not remove the radical objections to that constitution. That Legitlature's removal of restriction on the right of suffrage, would be a temporary expedient evincing a good disposition, but showing only a very thin salve on a deep wound.* No less could be

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*The writer will now add in view of the events transpired since the foregoing was written, that it is no excuse or relief for it to be shown, as now it is, that the Legislature just adjourned, this 23d of June, has acted wisely by enlarging suffrage. Without that, their scheme was inert and could not be put into operation at all, with any semblance of fairness.

The citizen in this East part of the State, it seems to me, and I greatly regret it, who shall take both oaths, must of necessity, which is inherent and unavoidable, perpetrate a perjury. The powers incorporated in the Wheeling and Alexandria constitution, are prescribed without legislative agents deputed by us to prescribe them; and after the dictatorial prescription as to us, our consent, or submission rather, is exacted by an oath to be governed by it. If this government of the State is intended to be only provisional, conducted by a Governor appointed by the President of the United States, as to seven-tenths of the people who may hereafter be qualified to vote, in any general election, by taking the oath of allegiance to the government of the United States, still, I would say how unlike it is, and repugnant, to the Constitution of the United States, which provides for the election of the chief magistrate, by popular suffrage, or in a mode considered equivalent, to wit: by electors chosen by the people.

So, many a King has acted well, at times, for the *subject* people ruled without their consent. It is the representative system, as accredited by the Constitution of the United States, and by it reserved to the States, in and by which this writer seeks to have this State re-established.

By this inconsistent oath, by this superaddition of oaths, this State is brought to a balk—a dead lock—so that a moral and intelligent

done, without cofessing that the design was to carry on the government, without giving these seven-tenths of the State any voice in administering it, as they had none in originating or organizing it.

Let this topic be presented in another aspect; or if this be so like the other aspects in which it has already been a little looked into, let other language be used to exhibit it in a somewhat different light. How can the oath be taken by the citizens in East Virginia, to support the "*restored*" government? Is it not true that the State is not "restored," in any sense? If that word in the oath intends to represent that the government of the State is now as it was before the war, it is a mistake that is obvious in the fact that that government is claimed to be suppressed, by those who have enacted another in its stead. If that word intends to convey the idea that the former government, which the Washington authorities admit is only under a *temporary* suspension, is revived, this is equally a mistake—and a mistake obvious in the fact that *it* is not being put in motion in any of its functions, but the Alexandria Govern-

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people, cannot get license under the revenue laws of the State, to practice law, or medicine, or carry on any business that requires a license; just as is the case, and to a greater extent than is the case, in North Carolina, (and in other States,) where, for instance, Robert P. Dick, Esq., has declined to qualify as United States District Judge. The policy I am opposing, in part, is a needless multiplication of oaths. There it is the case that by the act of Congress, July 2, 1862, an oath, now needless, excludes from public service a sincere Unionist; whilst in this State, an inconsistent oath drives loyal citizens from public service and private business.

Why, if "West Virginia" is lawfully a State, should the citizens of East Virginia be required to swear to support its government? Why not as well require us to swear to support the government of Kentucky, or that of any other State? If "West Virginia" is not lawfully a State, ought anybody to be required to swear to support its government?

The constitution of the United States, as has been argued herein, does not allow the division of a State by *legislative* consent. That consent should be given, if at all, only by a convention of the people of the whole State, and then be of no avail without the sanction of the Congress. Suppose the constitution does not disallow, as an incipient step leading to the division of a State, or consummating it, that one constitution may be substituted for another, by the individual consent of the qualified voters of the State, still I would insist that it ought not to be unfairly done, and least of all ought it to be so done as to bring on the people of any portion of the State a moral obligation to uphold an unconstitutional transaction.

ment is being driven, as a wedge, between the people of the State and that former government of theirs. If that word "restored" is used to signify that the State is re-placed in its former practical relations in the Union, such is not the case. The Senators elected by the Alexandria Legislature, have not been admitted to the seats, though they applied with their credentials. Whatever was the cause of the failure to admit them, want of time or what not, the fact is that they have not been admitted, though they may expect to be. This expectation may be disappointed again, as it was before, for want of time, or some other like frivolous excuse alleged under cover of some other cause, or for some other excuse more serious than any that has been alleged as the reason for the failure to admit them on the former occasion. Any how, in the fact that the State is not in the Union yet, in the furniture of a revived civil authority, the government of the State is *not restored.* And, moreover, if the Senators had been admitted from the State which is claimed by the prescribed oath to have been "restored," even if it is "restored" in any sense not here adverted to, if there is any such sense, or if they shall hereafter be admitted, they will at most only be Senators sent up by a very small part of the State, and not by a Legislature elected by the whole State, as the Constitution of the United States, requires they should be.

Apart from all *that,* as much as it is, the oath requires the taker of it (properly) to support the Constitution of the United States, and (improperly) the "restored" government of Virginia. The "restored" government involves the erection of "West Virginia," within the old limits of Virginia. The Constitution of the United States provides (as has been conceded for the sake of the argument, only) that such a formation of a State shall not be accomplished without the consent of the Legislature of Virginia. That consent has not been regularly given. *In strictness, the regular Legislature could not give such consent. It could be consented to only, if at all, by a Convention. The Constitution does not allow such an erection of a new State. It is the formation of a State by the junction of two or more (or parts of) States, to which the Constitution requires the consent of the*

Legislature thereof. It is peremptory that "no new State shall be formed or erected within the jurisdiction of any other State; &c. The case of Maine is not a precedent against that strict interpretation—indeed, the erection of Maine into a new State is not an example under any construction—for this, if nothing else, that Maine was not a part of the State of Massachusetts, but was only connected with that State, as a province, from 1639 to 1820; at which last date Maine was admitted into the Union. It is true that Massachusetts did give consent to the erection of Maine into a new State. How that consent was given, whether by the legislature or by a convention, no history that is accessible, tells.* New Hampshire was in the same case as Maine was, that is, under the jurisdiction of Massachusetts, and shared her fortunes, until the period of the Revolution in 1776. It does not appear that Massachusetts gave any consent to the erection of New Hampshire into a State. Nor is it material how Massachusetts gave her consent concerning Maine. All the early history of this province shows that its territory was never considered as part and parcel of Massachusetts, as were West and East Virginia linked into one State in territory. No doubt, either, is there any room for, that that consent of Massachusetts, respecting Maine, was fairly given, and not pinched and squeezed out, as is our consent, without opportunity to give or withhold it, in the case of the partition of Virginia. The Wheeling and Alexandria

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* Since the text was written, I find, in 35th vol. Annals of Congress, 13th Jan'y, 1820, that representative *Roberts* referred to the action of Maine, in seeking admission as a State, as having been "*duly* authorized by act of the Legislature of Massachusetts." If that precedent were entitled to respect, but is not, as it was without constitutional warrant, and if Maine be regarded as thus being a part of Massachusetts, against her troubled story which tells she was not, still the case of Maine would be a precedent inapplicable to the proposed partition of Virginia. It would be inapplicable in this, that it was by "act of the Legislature of *West* Virginia," so called, and not by act of the Legislature of Virginia, (as in the other case of Massachusetts,) that the erection of West Virginia was pretended to be authorized. The cases would be parallel, however both would be unauthorized by the constitution, if in that case Massachusetts had not been consulted, as Virginia was not, and Maine by her legislature had given the consent, as West Virginia did; or, if the Legislature of Virginia had given the consent. But there is no parallelism, and therefore no precedent. The case being altered alters the case.

Conventions, if the representatives in both had been in one, excluded two-thirds of the whole State, whose consent it is claimed is covered and conveyed by the action of those partial conventions, and sought to be enforced by an oath which disfranchises, for office, or for license in any taxable avocation, all in East Virginia who will not take it. Though the taking of it by the people may be regarded as an evidence of their loyalty, and will elicit a compliment for them from the men in the official circle, the writer had hoped it was a compliment this people would show they had too much spirit and understanding by compliance with it, to deserve. The effect of this oath, whatever was its design, is to secure the consent of the individual citizens in the East, to the formation of West Virginia. It is not by the individual citizens, even if they were to act in a grand mass meeting, and with no dissenting voice, that the constitutionally required consent can be given. It is the consent of the Legislature of the State of old Virginia, as a whole State, that is indispensable to validity, according to the Constitution of the United States, (in this view of it,) and that consent cannot be substituted or justified by any consent in any other form, to make it lawfully effective for the erection of a new State within the limits of the old State. This view for the sake of presenting the argument, is taken under the concession that the constitution allows, in the case, the consent of the legislature of the whole State as sufficient, which however it does not allow. If the consent by the individual citizens, by oath or otherwise, had been asked or required before the erection of the new State, it might, under that concession, wear the air of plausibility. But the erection of West Virginia, is not even that much in deference to the spirit of the constitution, even under that erroneous construction; much less does it conform to the representative principle of the consent of the governed. The effect of the oath is to secure the individual consent of the citizens, *after* the fact. It is *that*, instead of the consent of the legislature, *before* the fact. The parts of the oath, as I apprehend, do not consist with one another. But I have seen, and much fear shall often see, not owing to any lack of honesty, but to a

superabundance of heedlessness, on the part of the people, how impotent law and logic are, when they come in collision with the exercise of political privilege. Still I would warn my country that until it shall be otherwise—until the constitution is respected as the limit of authority, we shall never again be safe in freedom's rights, and our noble experiment of representative government will inevitably fail, and in scenes more revolting, perhaps, than those exhibited in the late war, the scandal of the age.

Some attempt has been made, (Oct. 20th,) in several quarters, to induce the belief that the oaths of amnesty under the presidential proclamations, may be likened to that oath to support and defend the "restored" government of Virginia. There is not the least resemblance. The former oaths are prescribed by federal power, and the latter by State power. A no less reckless attempt has been made to liken the former oaths, in point of authority to require them, to the oath prescribed by the act of the Congress of July 2, 1862, directing a test other than the oath to support the constitution of the United States. Neither is there any resemblance here. The former relate to the private citizens, alike with the public men, or other officials, whilst in the private station; whereas the latter relates only to those elected by the people, or appointed to office, to be taken (else a denial of the office ensues) upon their induction into the offices to which they have been chosen by popular suffrage or otherwise appointed to be the representative men or ministerial agents. The amnesty oaths were and are to put to the test, the *prospective* loyalty of all the members of the society, or State, just emerged from a rebellion. The test oath of induction into office, has no such purpose to serve, in any sense. It relates to the *past* conduct of them who are to be subjected to it. It proposes to subject to its ordeal those only who have been appointed to serve that society which has already been purged and justified by the amnesty oaths. These (amnesty) oaths were required of men who had striven to become foreigners. These (amnesty) oaths were prescribed in virtue of the national sovereignty, just as in the nation's foreign relations, on the kindred subject,

the oath of allegiance is made necessary to naturalization. The State was not *out* of the Union and foreign, but *in* and delinquent. The test-oath of office does not deal with foreign subjects, but is altogether within the domestic polity and the circles of official service the constitution circumscribes. To illustrate: The constitution determines how many Senators each State *shall* send up to the Congress, but it does not declare for what the Congress *may* "declare war" or "make a treaty of peace" with any foreign power. The act of amnesty was one of grace, and the *competent* giver had the right to set the conditions. The test-oath of office is an act affecting reserved rights that are restricted, as alone they can be, just precisely as they are defined in the constitution adjusting them; and they cannot be either diminished or augmented, unless and until that constitution is altered. But say they who liken these oaths, and intimate or insist that the one is as unconstitutional as the others, "the swearer is sworn by the amnesty oath to abide the proclamation setting the negroes free, which violated the constitution." Now, it was not the proclamation, but it was the sword, that set them free. We who incur (if we *will*) this branch of the amnesty oaths, made the war, or accepted the wager of battle, of which the chief result is the negro's freedom.* We made a positive sur-

*The law and the morality of this whole subject of slavery, so far as it was the proximate cause of the war, and so far as its destruction, as a property, is the effect of the defeat of the South in that war, can be put in a nutshell, thus: I, the South, told him, the North, that his purpose was to take from me my hat, negro slavery. No, says he, 'tis not so, there is no purpose to touch (slavery) the hat on your head—it is yours. He says so to me three times and gives me a writing to that effect (which is in three votes in the House of Representatives). I am not satisfied with that threefold disavowal of design to take away from me my hat. I approach him, when he is standing with folded arms, and charge him with a hankering after my hat—he protests he regards it as mine, to do with as I please. I hear him with incredulity, and take counsel of my fears that he does intend to take my hat from me. In the pride of my physical strength, and in the strength of my suspicion, I rise up in his presence and challenge him to fisticuffs to beat him off from that design he had so often denied he ever meditated. In the fight I am overcome, my strength being less than I had supposed. Surely, I will be bound in honor to acknowledge that I have lost all claim to the hat, forever, even though he decline the victor's title to it, and let it lie by, where I lost it, as the negroes linger here where we lost them.

render of the ownership—a surrender of our constitutional right to it. We certainly assented to, if we did not seek, the issue of battle. Now, nothing is surer than that a man (or State) has a right to give up his rights. Our right was safe —we would insist it was not—we went to war to make it safe, when we knew they who opposed us were seeking an opportunity to do what they had as often as three times confessed the constitution would not let them do. So unequal was the war that our resting our right of the ownership on *that* issue, was equivalent to a voluntary surrender. They to whom we thus surrendered that right, as it was under the laws from which we appealed to a trial of physical forces of known odds against us, now tell us, just exactly and exactly justly, that we should seal our verbal promise to abide the result, by a recorded oath which, if *our assent* to the issue had not been given, would be unconstitutional, but having been given, is made constitutional against us in virtue of that assent and consequent surrender of our right. The one oath is to support a government we had no voice in making; the others or amnesty oaths are to support an effect of the war the South would have.

As Junius says, if there be a defect in the representation of the people, that power which alone is equal to the making of the laws, in this country, is not complete, and the acts of legislature, under that circumstance, are not the acts of a pure and entire legislature. I speak of the theory of the constitution; and whatever difficulties or inconveniences may attend the practice, I am ready to maintain that as far as the fact deviates from the principle, so far the practice is vicious and corrupt, and ought to be relinquished by a prompt and ingenuous return to the principle.

The exclusion from office and from suffrage, by the Alexandria constitution, of all who were members of the General Assembly at Richmond, during the war, is retained, as if it was not as necessary for the people of this part of the State to have a State government during the war, to protect us, as it was that the people of that part of the State which is now "West Virginia," should have been provided with a govern-

ment during the war, to protect them. Indeed, there is no reason in the philosophy of the system, to justify the disfranchisement of the members of the Confederate Congress or members of the State Legislature. Their action was but the logical and governmental sequence of the upheaving and overruling ordinance of secession passed by "sovereign" conventions. Though secession was as unjustified by true construction, as it is unsustained by arms, individuals had no way of escape. The public opinion became a resistless torrent, and men of capacity were compelled by it to serve in the Confederate Congress. Such men, in such a conjuncture, were not to be expected to suppress the promptings of private ambition and public duty. It is but the often told story of ambition in all past ages. It will be well if the men in authority, since hostilities have ceased, shall succeed in maintaining their authority without abusing it. Most of the men who served in that Congress, would now, under the promptings of the same private ambition, devote their talents to the public duty of serving and advancing the popular opinion when turned back to its former channels. By the "sovereign" people,

> "in the rebellion,
> When what was not right, but what shall be, was law,
> Those men were chosen; now, in better hour,
> Let what *is* right be that which *should* be done."

And, moreover, as to the members of the State Legislatures, it cannot justly, nor should it, be overlooked, by the powers that be, that, irrespectively and independently of the rebellion and the consequent war measures, the State needed and was entitled to a Legislature. Not a few of these members admired and would have shielded the federal Union. The voice of some of them, was still for peace. Some sought seats in the Legislature, (as some did in the Congress,) to escape the conscription into the army. Most of them looked only to the domestic affairs of the State. Many of them who looked beyond to the conduct of the war, were induced to seek the success of our arms, in order to secure a firmer footing, than defeat could afford, for favorable terms, whenever nego-

tiations for peace might fortunately intervene. If right that *any*, can it be that *all*, members of the State's Legislature during the war, shall be disqualified to vote or to be elected!

A RETROSPECT;

and what of the future?

PETERSBURG, June 19th, 1855.

What a spectacle have the people of this great Federal Republic exhibited, as it is embraced in the period intermediate between the 8th of January, 1861,* when the writer threw a prophetic glance springing from facts, into the issues of the late war, and this day as he looks upon the frightful horrors outstanding for the crowded pages of history! It is suitable and salutary to make references to the past events constituting such a spectacle, when the retrospect is indulged to be a guide for the future, and the basis on which to superinduce and solidify reconciliation and concord. At the first date, the unexampled career of prosperity might have been maintained, in its gushing stream and sparkling spray, if the public councils of the country would have "sprinkled cool patience" upon the heat and flame of their distempers. Not so, it is said, in the sense that this war might have been prevented; but only deferred. It was not love or dislike of the Federal Union which brought on the war. It was neither kindness of philanthropy for the black slaves, nor avarice of their labor without wages, that made the war. No such irrepressible sympathy for any portion of the human family in distress, if such had been the situation of the blacks, has ever been known to impel the people of the North. They are too intelligent not to know that there was distress enough at

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*That is the date of a letter in the first edition, which predicted the South's defeat in the war the writer was striving to avoid. It was not that he was a prophet, but only that he took heed unto the common sense inculcated by that scripture that asks: "Or what king going to war against another king, sitteth not down first, and consulteth whether he be able with ten thousand to meet him who cometh against him with twenty thousand?"

home to have absorbed all their teeming sources of charity; and they are too christian to be ignorant that the Apostle Paul teaches that all men everywhere should learn to relieve all manner of destitution at home, before the benefactors should spread their benevolence abroad. And at the South it was too clearly seen how slave labor without wages, which vastly increased the natural indolence of the blacks, had long been making the South poor indeed, and laggard in the race of thrift, especially in the mechanic arts. No, it was not slavery that was the cause of the war. And just as unquestionable it is that it was not love of the Union, in the one section, or dislike of it, in the other. In the South, it was the boast that in the earliest stages, her public men were foremost in constructing the best government the world ever saw. This was one of many strong links to attach the South to the Union—powerful to repress any upstarting dislike. At the North, it was seen and avowed that the Union was the strongest safeguard of the ownership of slaves, and kept off foreign interference. So manifestly was this so, that, in 1850, memorials were sent up to the Congress from the North, to the effect that on account of the slavery in the South, "some plan should be framed for the immediate and peaceful dissolution of the American Union." Then, it was not a love or dislike of the Union, that engendered the distemper of the times, that produced, when it did, the terrific spectacle that has intervened between those periods. Some other cause for the war, must be found in the deep-vaulted reason of human conduct. It would be the worst of reproach, if such a spectacle had been produced without a cause in its reason sufficient, *or* to become sufficient only a little later. It were useless to inquire further than has been already intimated, how it might have been postponed, perhaps the length of a generation. It was to come, and it has been. *The law of population produced it.* It was ambition, with angry passions, that precipitated it only a little time. The toiling millions of the "free" States and of the world, wanted the fertile fields and dense forests of the "slave" States, for tillage, as their treasure. The teeming toilers of the world who make their bread

by "the sweat of the face," wanted elbow room. They must have it.

In support of the correctness of this view, let the language of (now) Secretary W. H. Seward, the foremost statesman of this age, be cited, though it is less powerful than the evidence of natural causes. It was in the Chicago Convention he said: "There are the Southern States, with the finest territory on the face of the earth, peopled by four millions of blacks. That territory is wanted for the free white men of the North; and those blacks must be put out of the way."

How benignant are the constraints resulting from the cause here assigned as the only sufficient one that in reason could have existed to produce the war, to induce all in its endings and its effects, to be impressed with and show forth right tempers—they that come, to come with gentleness, and they that are come to, to receive with kindness! God gave His earth to the human race to occupy and cultivate. Why should it not drive away from all the spirit of reproach that lingers in the other erroneously alleged causes of the war?

The writer craves, in this retrospect, at the risk of being considered egotistical, to bring up the fact that during two years he did earnestly desire that the attempted secession, though without cause and all wrong at first, might be successful. It was whilst he thought freedom had failed and was trodden under foot in the States that remained satisfied in the Union. It did indeed look as if every barrier would be broken down, as many were, by the incursions of usurped power; as once was the case, and by somewhat similar means, in old England. The federal Congress in this country, as Parliament in that, had in their terror enacted that the executive proclamations should have the force of law. The constitution seemed to be really undone. But soon in these "Confederate" States, the like incursions of power made gigantic strides which the writer strove to avert; and his value of the Union revived. It is now believed by him, that in these American States, as in Great Britain, freedom will on the first opportunity begin again to make its appearance in health. Let the men in authority be true to the constitu-

tion, and the people loyal to the Union, and freedom right early will again rejoice.

Nor is that all of self, as the writer has been tempted by the retrospect to say that much. The reason here, as elsewhere when the writer refers to what he thought or did or did not do, is that the interests of the public law and of private rights are involved in all such references, and he aims to advance *them*. At one time in the war, he urged the principle of taking no prisoners of the enemy's soldiers on our soil. That is not the black flag which is execrable in his judgment. The black flag covers cruelty to prisoners. The principle urged instead, is to take no prisoners of war to be dealt with as such, but all captured unavoidably to be treated tenderly, with the understanding that they must make haste to get out of the country. It was urged for acceptance as calculated to stop the war. Now that war is over, the same principle is reproduced as fit for the civilized nations, as more likely, than the usages now and of late years in vogue, to prevent wars. It is but too well ascertained that the existing usages of so-called *civilized* war, as if any war was civilized and not savage, are utterly impotent to prevent wars. They do indeed but multiply them. The reason of the principle urged as a good substitute for those barbarous usages, is familiar in other forms. When the *animal* in man, outstrips his reason, he can be held in check, or driven back, only by some conduct of his antagonist which will impress his heart, or at the least his imagination, with consternation, and overmaster his roused passions. By the civil law a man may, so as this principle proposes, give no quarter to the invading foe who assails him in his castle. Stricken down in his onset, he has no claim to assistance; and if still capable of renewing the assault, he may be lawfully smitten again. When entirely disabled, though still alive, he may lawfully be left to such succor as others than him whom he had assailed, may chance to afford. And the principle urged, besides its accord with the civil law, is only the same principle in another familiar form of its practical expression, *to wit*, that the modern improvement of arms and other munitions of war for human slaughter, is inclining the

nations to avoid war. The writer's articles urging that principle during the war, just exactly as they were published in the Petersburg *Express*, will show that he intended it in the interests of christian civilization, as well as for success in that war. It is but too true to justify the remark, that, in all wars, however and whenever prosecuted, the men in authority, and those in command, have shown too little aversion to the shedding of human blood. They have seemed to be more careful, if otherwise careful at all, that it is not their blood, nor the blood of their kinsfolk, that is shed. The writer deemed the principle as he proposed it for practice, eminently likely to be influential and effective in preventing national wars and the inevitable waste of human life. He also published an article in the same newspaper about the same time, expressly intended to persuade both armies to withdraw from the enforced service, with their arms, and to repair to their homes, and to take care that no more armies should be raised in either section—which was said by some persons to be treasonable to the South. If other persons did not, nor could, look into the vast trouble, except in one of its magnificent points of susceptibility and possible issues, it is to be regretted. And now the writer says that if *his right way* for readjusting the States in the Union, be in due time resorted to, the prosperity of this old State will ere long largely exceed any she might ever have reached, with negro-slavery continuing to exist. Whilst he sought, with all effort he could, to shield that ownership from any violent disruption, he never desired it should be perpetuated. He has often put in print his opinion that it was "a pecuniary burden" (in 1863,) and "a blighting curse" (in 1832). As to other kinds of property, and in every other respect, the writer desires to see the constitution of the United States respected, and wherein its express provisions fail of apt application, its analogies observed. In former years, the constitution was the object of the patriot's admiration—the theme of the orator's praise—the subject of the philosopher's delighted meditation—and the gushing spring of the private citizen's security. Would that it may again and long give to every citizen that sense of assured

security in all valuable rights of person and of property, which alone can produce or sustain the proud sentiment of freedom, or make a free people happy. All *that*, if justice be done,* can be better accomplished without negro slavery, than with it. Here on this phase of the immense troubles of the times, I would raise the political Ebenezer of our State. I would give no heed to them who say, *forbear to discuss politics.* They do not digest the purport of the august subject. They only have a vulgar inkling of its vastness. They surely must think that politics consist in scrambles for office, on a theatre where personal detraction, or abuse of officials, is the height of the argument. With all such, the light of politics shines in darkness, and the darkness comprehends it not. Indeed, it is true that the witticism of Swift, when quoted as if it was meant for a slur on politics, is sheer nonsense. Not otherwise than by the labors of the politician, have two blades of grass been made to grow where but one grew before; or one ear of corn, in place of none. It is alone study and free discussion of politics that ever produced society or developed its organization and economy. The laws the politicians make, are necessary to encourage products of agriculture and of the mechanic arts, and to secure the enjoyment of them.

Though the writer is so impressed respecting discussions of politics, still on that most difficult problem of the future of the negro, on this continent, he thinks it will be wise to take heed unto the teaching of Tristram Shandy, where he says that when the precipitancy of a man's wishes, hurries him on in his ideas ninety times faster than the vehicle he rides in, woe be to the truth, and woe be to the vehicle, and its tackling too, (let 'em be made of whatever stuff you will,) from which he breathes forth the disappointment of his soul. The recent events respecting the destiny of the portion of the black race amongst us, have gone ahead of both the fears and the hopes of the one side and of the other, on the subject of their continued slavery. The sudden event of their

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*See President Lincoln's annual message in 1862, on compensation for slaves set free.

universal emancipation amongst us, has outrun the calculations of the wildest on the one side, and the firmest on the other side. The power of the Union which was much valued by many, as the surest support of the ownership, until by some peaceful process it might be put an end to by degrees, has, like a torrent swept away every vestige of title to the negroes as a property. And now that the ownership has been so swept away by the force of arms as wielded by the administration of the government of the Union, the moral power of that government, in the might of a milder statesmanship, as the rainbow after the storm gladdens and assures, must be exhibited, or there is nowhere to find assurance, or promise even, that these States will not be deluged by the mingled shed blood of the races. May He in whom all things consist, overrule that Union to show itself more valuable to the States in ending, than it was in defending, "the peculiar institution."

Whilst curiosity and interest—interest in a million of forms—urge the investigation into the future of the negro, on this continent, there are dark spaces which the eye of the human understanding cannot see into. History, hitherto, has exhibited but two examples: Where the blacks excelled, they destroyed or drove off the whites; and where the whites excelled, they subjected the blacks to servitude. It is happily for us to be expected, such so far having been the exemplary conduct of the blacks, since their emancipation, that such a destiny does not await either race. So civilizing has been the bondage of the blacks, that, whatever other direction under Providence the course of events may take, the one race will escape bondage, and the other banishment or other brutality; and history bear a new record. Though the prejudice of race might possibly be overcome in the belief that all the human family had a common origin, still that other prejudice of color, being constantly visible and incapable of being put out of sight, is ineradicable. The freedom of the black race cannot silence that prejudice, much less remove it. As in the North it has been, so in the South it will be, that the repugnance of the whites to the blacks, is but increased by the

freedom of the latter. It has often been remarked that that repugnance is most inexorable in the States in which the slavery has longest been abolished, or never existed subordinating a large black population. If law cannot compel, and prejudice forbids, equality of these races, the result must be, whilst they inhabit the same region, that contact will produce collision. Such collisions will increase in frequency and violence, until one party or the other is the master, unless the contact be prevented. This can only be done, by the removal of the one race or the other, from the inhabited region. This can only be done by man's direct exertions, or by the operation of natural causes. Then, the best course for the whites, is, under the influence of philanthropy or of selfishness, to treat the negro with no violence, under color or cover of law—to be patient and await the usually slower, but invariably surer, ways of Providence Who works as man seldom knows, until His purpose is displayed in the accomplishment. The whites have their hands full, so exhausted are they by the war, in assisting one another; and yet they are willing to, and will do no less than, extend to the blacks a benevolent kindness in all manner of unavoidable intercourse, as well as in engaging them in any services they are suited for at fair wages—and a generous justice in fulfilling all contracts with them for their services.

THE RIGHT WAY.

It is in the mind of the reader to ask why does the writer persist in his right way? The answer is, because it is *the* right way. But the objector rejoins that another way is almost consummated. Not so fast, the writer must surrejoin. The time is not yet, when that other way by provisional governors, which President Johnson, with so much of good disposition that all admire it, has driven so far, should and may be balked. That time cannot arrive, until the Congress shall have assembled. When it has assembled, the objector suggests, it will be unwise in the Congress to undo so much

already done—it will be annoying, not to say unjust, to the South, some of the States in which will not only have incurred the costs of the election of members to the Congress, but, much more, have held conventions and formed constitutions, &c., &c. It will be cruel to compel the South to run the round of all that work again. If all that *were* necessary to be done over, very much of which need not be retouched, however, still it would be wise to require it, and for the special purpose, even if it would serve no other than the purpose, of making it known that, at whatever cost or inconvenience, the constitution of the United States must be observed. The new constitutions that will have been adopted by State conventions, will not need to be retouched, if republican in form, and within the reserved rights of the States. It will be wise for the Congress to intervene to do its appropriate work and high duty, even in respect to the less valuable consideration of the pecuniary costs involved; because, to make it known that the right way in this conjuncture, must be pursued, will exert a salutary influence in preventing other departures which are certain to be more expensive than the regular course. For instance, consider the twenty-seven hundred millions of debt incurred (whoever was at fault) by the late departure from the right way, the chief wrong of which, to wit, the dislocation of these States from their cooperative labors and correlative benefits in the federal Union, is all that is possible to be corrected. If the President with the acquiescence of the Congress, may appoint the governors of States and through them severally control all elections in each State, why may not the Congress with the assent of the President, or by a two-thirds vote overruling his veto, direct the regulation of the right of suffrage in each State? Each would do signal violence to the constitution, and either usurpation would be quoted as a precedent for the other. The right way would avoid both.

If the right way is not pursued in correcting that wrong, the government of the United States will receive a shock under which it must stagger, and from which it will likely never recover.

It is passing strange; and can it be that the All-wise One intends that the scheme of self-government, by written constitutions and concurrent laws, made by representatives, by liberal suffrage, by the people chosen, shall not succeed? What is it that is passing strange, which causes the distressing doubt to spring, and almost have sway, whether what the world has esteemed the most perfect federal system vocal with popular freedom, can have success? It is that the Press, the foremost enlightener of the age, seems not to understand the bearings of this great occasion. The Press, South, is bespattering with its eulogistic strains the most signal departures from the representative principle, as displayed in the President's plan for restoring these States, without bestowing one thought expressed on the constitutionality of that plan, as though indeed we had no constitution. It is not that they do not understand that most admirable instrument that *ought* to be (if I am in error that it is by this Press considered) sacred. It is considered sacred by them, and yet they overlook its injunctions, and jump over its limitations, to get, at once, as the seeming interest of the hour suggests, back into the Union. And the Press, North, with as little regard for the constitution, is, in the main, opposing that plan, not for the reason that it is unconstitutional, but because it stands out boldly and bravely against their desire to defeat it for this that it is not as unconstitutional as they would have it. They insist that these States shall be constrained to give up the right, they have always enjoyed, to regulate suffrage by determining who shall be invested with that political privilege, each State for itself, and no one, or all others combined, for any other. That Press insists that Congress shall intervene in this vital subject, to control the State. As none are so blind as they who will not see, and the object here is so conspicuous that they who will open their eyes cannot fail to see it and to discover the road to it, the conclusion must be, if they do not find *the right way*, that they are smitten with judicial blindness. The Divine Wisdom would not so afflict them, unless it is His holy will to use them to sink the system and for the good of the human race bring in some substi-

tute. If this be so, my labor is in vain, and I am smitten with judicial blindness. In my judicial blindness, if it so be, He gives me, nevertheless, soundness of mind to say in devout humility: His will, not mine, be done.

PETERSBURG, Sept. 22d, 1865.

There are certain questions of constitutional construction that have long been in dispute, and it seems it would be well, if they could be settled, so as to be understood by all men engaged in the public councils. I have for years bestowed much study on those questions, and whilst I do not presume that I can accomplish the object of getting a universal concurrence in my views, such as there is that two and two make four, still as there are some persons who confide in my views of such subjects and have requested me at this time to express my opinion on two of them, in the newspapers,* I have made up my mind to do so, not of my own motion, but at the request of others whom I will not disoblige by declining.

1. It is in dispute whether a State Judge declared by the constitution of his State ineligible to any political office, may be admitted to the seat in the Congress of the United States, if elected by the qualified voters, and ascertained to be in all particulars qualified as required by the constitution of the United States.

On that question I am of the opinion to say that the Judge, though he is ineligible, should, when he has been elected, be admitted to the seat, if the requisite qualifications prescribed by the Constitution of the United States are found to be possessed by him: notwithstanding he does not possess the State qualification. At once upon the enunciation of that proposition, most persons will say, that it is paradoxical. Most persons will dissent at once, because they see on the surface that the proposition is, that the man is ineligible, and still, *if elected*, may be admitted to the seat. Let such consider that our

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* Parts of this article were first published in the Petersburg *Express.*

system is complex, and not simple and single. Observe the terms, *if elected*. In that expression in stating the proposition, and in that *act* (of making the election), is comprised the explanation which relieves the proposition of its paradoxical appearance. The election will have been in violation of the constitution of the State, although the power to make it is not inhibited to the State by the constitution of the United States. The power is not inhibited to the State, nor to the people thereof, by the constitution of the United States; but the people of the State by their State constitution have prohibited themselves from making the election. The Congress, notwithstanding the State's interdict of its people to make the election, ought to admit the man who was recently a Judge in his State. to the seat, when all the qualifications concur in him, which are prescribed by that government, that is, by the constitution thereof. Yet, he ought not to have been elected. Why not? Because the State constitution forbids his eligibility; and the people, that is, the qualified voters in the district, ought to have been governed by the organic law of the State. No less ought the constitution of the State, which is its *organic* law, to be obeyed by the people of the State, until it is altered by the people themselves or adjudged by some competent court of law to be repugnant and of no effect, than ought the *ordinary* laws of the State, which are the acts of the State's legislature, to be obeyed, until they are repealed. The people have not a right to elect whom they please, but such only as are qualified according to the laws. They only have the liberty to elect such as are within the law. It is in this country, as Blackstone says it is in Great Britain: "Subject to the restrictions and qualifications, every subject of the realm is eligible of common right." It is only the selfish or designing aspirants who will tell the people that they have the liberty to elect whom the law disqualifies. It is only the lawless who will suggest that the *enactment* of a regular legislative body, be it the Congress of the United States, or a State legislature, or a city council, may be disregarded by any within its jurisdiction, until it is repealed or adjudged void by the judicial authority—much less should the provi-

sions of a State constitution be neglected or violated. Each house of the Congress is bound by the public laws of the United States, and the qualified voters of each State, are bound by its public laws. Then, the conclusion is that though a citizen, a recent judge or other person, who is declared ineligible by his State, should be admitted to the seat after he has been elected to the Congress, in every case in which he is qualified as the constitution of the United States requires; yet, no one who is disqualified by the State, ought to be elected, because the law in force ought to be obeyed.

In the same principle is the case of every one who is disqualified to hold office under the Alexandria constitution which is now being enforced in this State. The provision is, in substance, that no one who was in "Confederate" or State office, aiding in the late rebellion, shall hold office under that constitution. Be it observed that the opinion has gained some footing, that a member of the Congress, is not a State officer, though he is elected under the State's laws to serve the State. Assuming, here, that he is a State officer, and it being then clear that he is disqualified by the present constitution of the State, the principle vindicated by this argument would require that he should not have been elected to the Congress, but when elected, if qualified in all respects as the constitution of the United States requires, he should be admitted to the seat.

That doubt which sometimes prevails to the extent of governing the expression in acts of legislaton, is the cause of the tautology in the *third* article in the Alexandria constitution. That doubt, whether a legislative representative of the people, is an *officer*, is admitted into that *third* article where it declares that no person *who held office* under the "Confederate" or any rebellious State government, and repeats *or was a member* of the "Confederate" Congress or of any State legislature in rebellion. The repetition implies that it was not certain that a member of either legislature, *held office*. And yet that doubt is rejected in the *seventh* section of the *fourth* article of that constitution, as well as by the like section of the constitution of Virginia ratified in 1851, and which is still *the* constitution, if the State has not been out of the Union, by rea-

son of the rebellion. That doubt so admitted by the *third* article, is rejected by the *fourth*, where it is declared that the removal from his residence of any person elected to either branch of the general assembly, "shall vacate his *office*." So plainly is a legislative representative of the people declared in Virginia, to be an *officer*. And clearly and completely the position of a member of any legislature, is an "office" which means "a particular duty, charge or trust conferred by public authority, or for a public purpose." It would seem to be needless for legislators to be addicted to the circumlocution the Alexandria constitution indulges and itself contradicts.

So much only on that question which is so fruitful of views in support of the conclusion arrived at. The other question is more difficult, though it is capable of as definite a conclusion.

2. It is in dispute whether the Congress can, by a statute, or in deciding a contested election, require, besides the oath to support the constitution of the United States, another oath, or any other oath, to entitle the elected to the seat.

I propose to give my views of this topic, by responding to so much of a late letter from that distinguished gentleman, Hon. John M. Botts, as relates to this subject; and from which I dissent. All Mr. B. urges to the effect that the enactments of the Congress, including the impending *test* oath, ought to be obeyed, until repealed or adjudged void, is incontrovertible. The leading doctrine, however, of his letter, it seems to me, has no foundation in our system, and is repugnant thereto in all relations. Mr. B. cites and recites the *third* section of the *sixth* article of the constitution of the United States, which requires the oath to "support *that* constitution," and also as positively prohibits any "religious test oath," for any office, State or federal. He then says:

"Here, then, (in that section,) is to be found the prohibition, and the only prohibition, upon the action of Congress;" (*to wit*) "that no religious test oath shall be required."

Now, I apprehend, a single question will expose Mr. B.'s misconception of the constitution. Has the Congress authority to require an oath disqualifying every citizen, in other

respects qualified, who cannot or will not take it, to the effect that he had done no act since the war ended, *adversely to extending suffrage to negroes?* That is not a religious test oath, it is understood. Who will contend—will Mr. B.—that the Congress has power to prescribe such an oath disqualifying all who will not take it? Yet, his opinion and arguments admit the existence of the authority in the Congress to do that very thing, if only their *wisdom and experience* so suggest.*

The power to require such an oath on the subject of negro-suffrage, would enable the Congress, (should the President assent, or should they overrule his veto,) to deprive the State of its power to regulate suffrage. It would admit to suffrage the negro, against the State's consent.

Mr. Botts adds, and labors to show, that "the true reading of *that* provision, as it seems to *him*, is, that Congress may prescribe such other qualifications as their wisdom and expe-

* It would seem to be indisputable that the expressions of Chief Justice Marshall, in McCulloch vs. State of Maryland, 4 Wheaton, do not dissent from the view taken in the text. He says: "The oath which might be exacted [that is, fidelity to the constitution—is prescribed, and no other can be required." Still he adds to that emphatic declaration, what seems to be a direct contradiction; to wit, says he: "Yet, he would be charged with insanity who should contend, that the legislature"—that is, the Congress—"might not superadd to the oath directed by the constitution, such other *oath of office* as its wisdom might suggest." No other oath than that specified can be required, and yet such other oath as wisdom may suggest, may be superadded. The contradiction will disappear, and it can only be made to disappear, when, whether the membership in a legislative body is an office or not, it is understood that the oath of fidelity in the discharge of the duties of the office, is simply, no more or less than, neither beyond nor short of, but exactly equivalent to, the oath of fidelity to the constitution. In this view, let it be observed that the superadded oath would not in substance impose any additional obligation. Only the forms would be varied, and the only good effect, if any good purpose is served, would be in the fact that by the varied form of the oath, the attention is directed to the particular duties of the office. And let it be observed, that the oath of office—such only as an oath of office ought to be—and according to the meaning of the words, to utmost latitude—signifies that the party will, in exercising the office, in discharging its duties, be faithful to do all the law requires to be done in the position. The oath of office does not comprehend the idea that the past conduct of the party, has all been consistent with, or that no act of his past life is inconsistent with, the nature of the duties of the office to which he is assigned, or the character of him who, whilst he is filling it, must show a conduct adapted to the abstract integrity of the trust.

rience may suggest," &c., in addition to those expressed in the constitution, so only that it is not a religious test oath. It seems to me, that the Congress, in the light of the principle of construction which I will presently indicate as conveying my argument, has not the power to impose (and its exercise would be an *imposition*, indeed, of any) such additional qualifications as circumstances may arise and prompt them to prescribe, *whilst the constitution is unaltered.* The practical extent of the authority of the Congress, is that they shall see to it that no man shall be admitted, unless the qualifications *which are* prescribed, do all concur in him. If *not to prohibit* it to the Congress, gives the authority to impose disqualifications, then the constitution of the United States is not composed of *grants of power*, as all parties have hitherto conceded it is, but it is, in that view, an instrument comprising plenary powers unrestricted by reservations to the States or to the people, and unlimited, except only wherein the limitation is expressed. If that be so, then it is conceded that the constitution of the United States is an exclusive absorption of the entire system, rejecting State rights, even the right to regulate suffrage. That the legislature of a State may fix the representative age, and prescribe the anti-duelling oath, (to both which Mr. B. refers, and the authority to do which, I apprehend, he most erroneously derives from that section which he claims confers such large power on the Congress, on the contrary,) is manifest in this that the power to do those things remains with the States, because it is not prohibited to them by the constitution of the United States. By reason of the absence of such prohibition, the power to fix the representative's age and to prescribe the anti-duelling test oath, is expressly "reserved to the States respectively." *

The specific grant the section conveys, is, to require an oath to support the constitution of the United States. The specific express prohibition is that no religious test oath shall

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*Though much of this is in former pages, I trust it will be acceptable to the reader, who will find some thoughts expressed here, that are not embraced in the foregoing reference to the same subjects.

be required *under the United States*. It may be *construed* to prohibit a State's *omission* to require its enmerated officers to take the oath to support the constitution of the United States. It may also be construed into a prohibition on the several States to require of their officers in the home service, any religious test oath. This has always been a received construction. The specific grant to require one oath does not cover another, unless that other is both proper *and necessary*. The purpose is to bind the member by oath that he will support the Constitution of the United States. To effect *that*, it is not necessary that he has always supported it. Such was the contemporaneous exposition and has been the uniform practice, as the invariable form of the oath attests, to wit—"You swear that you *will* support the constitution of the United States" —and it is not, nor ever was, that the affiant always, or during any given past time, has supported it.

Using the language of Senator Benton—"The States, being original sovereignties, may do what they are not prohibited from doing; the federal government, being derivative, and carved out of the States, is like a corporation, the creature of the act which creates it, and can only do what it can show a grant for doing." Now, this grant from the States is simply to require an oath to support the constitution of the United States. Of course, a requirement of any other oath, even that the party, in the past time, always, or at any period, supported, or did not by any act oppose, that constitution, is outside of the grant, and aggrieves the genius of the government of limited authority. If the utmost extent of the grant, is not the exact measure of the authority, then there is no standard or steady rule—no bounds of the power to be exercised, but the unbridled will of the dominant party.

It would be difficult to bring the requirement of any other oath, under the cover of a curious distinction which some astute conductors of the Press have at sundry times sought to impress. They assert by the terms they use to state the shadowy thought, that there is a difference between enactments that are *extra*-constitutional, and yet not *un*constitutional. Now, *extra* and *un* denote the same negation. The

one is Latin—the other Saxon—that's all. Each is a prefix of negative significance. *Extra* means beyond, and *un* not within; and if the act of legislation is beyond, it is not within. It is a distinction without a difference, and is the more exceptionable, because it seeks to escape the substance of usurpation, and to hide itself in the shadows of authority. If authority is needed in support of this view, that which is very high is at hand to show that extra is equivalent to *un* or *not*. Lord Chatham said of Lord Mansfield's discourse on the motion in arrest of judgment in Woodfall's trial, that that discourse was "irregular,extra-judicial and unprecedented"—that is, *not* judicial.

The requirement that "the members of the State legislatures," and the other State officers enumerated in that *third* section, shall be "bound by oath or affirmation to support the Constitution of the United States," is not a a prohibition on the State to prescribe other qualifications for the officers from the States to serve in their general government. If the power of the State were derived from that third section, then in the many cases of State offices, in which the Constitution of the United States prescribes no qualification, the State could prescribe none. Then, indeed, the demagogue could ply his appeal to the popular passion to enjoy their liberty to elect whom they please, and lay it on with success to the utter ruin of regulated liberty.

This subject is serious enough to justify an appropriation of the language of the Scriptures: Strait is the gate and narrow is the way, that leadeth unto *the constitutional authority*, and few there be, of late, who find it. Whilst no portion of the people should elect any whom the constitution of their State disqualifies; still it is the duty of the Congress to admit whom the United States constitution does qualify. The Congress has no authority to require any oath, except *the one* "to support the constitution of the United States." The State retains the power to require any oath, except that they are prohibited from requiring any religious test-oath. These strait gates must be entered at, and the narrow paths be trod, by the majorities in power, in the appropriate spheres, or other-

wise our system cannot be preserved. It may, otherwise, be patched up for a time, but before long it will perish. How melancholy it is that they who have done the South most detriment, have been of her own immediate household. How deeply it is to be regretted that prominent men of the South should, at any time, and especially just now, express the opinion that the Congress has authority to prescribe *any* (but a religious) test oath. As limits are set to the exercise of power, for the protection of minorities, the South surely should not fail in exercising the privilege of free debate, to insist that the constitutional limitations shall be respected. How injudicious in any to assert or assent to the proposition that as the reins are in the hands of the North, the South should fold up her arms and close her lips and utter not a word of remonstrance, or expostulation, or argument. Any abstinence from the frankest and most earnest suggestions of facts or of logic in support of our rights, implies a belief that the representative men of the North have souls too frigid to conceive or too narrow to nourish noble or just sentiments. For one I do not concur in the ungenerous reflection. They who counsel such abstinence from free expressions in support of our constitutional rights, on the ground that we are in the hands of the North, as clay in the hands of the potter, do not tell us how we can or when we will get out of their power of numbers over us. They seem not to know, or if they know, not to remember, or if they remember the fact, not to be animated by its knowledge, that there is a vast difference between a determination to obey the existing laws, so long as they do exist, and that other disposition in derogation of elemental rights of freedom, to let lawless enactments remain in the existing forms of law exacting obedience thereto in utter abandonment of constitutional reservations. The South, the while obeying the laws and seeking their correction and reduction to the right standard, should shake off the dust of the dirty grave in which the late elections have buried her dignity, and a portion of the public Press by its course is threatening to inter her honor also, and stand forth boldly for her rights under the laws, not as the laws are, but as they should

be. How unlike is *their* counsel, to that of Junius, who, dedicating a collection of his letters to the English nation, exhorted and conjured them "never to suffer an invasion of their political constitution, however minute the instance might appear, without *making* a determined, persevering resistance."

Postscript.—A part of the argument of Mr. Graham, of N. Carolina, has come under my eye this date (Oct. 18). It is not agreeable to dissent from so able a man, especially when his views of the test oath concur with my own. The question, however, is so important that I expect to be excused for controverting his opinion on one topic. If I do not misconceive him, he insists that an enactment of Congress may be disregarded, if believed to be unconstitutional. Who is competent to determine its conformity to the constitution? Can any tribunal but the body itself or the Supreme Court? If so, what other appeal is there in the case? Admitting that there is no way in which the applicant can compel the branch of Congress to which he has credentials, to allow him to take the seat, it would only show the fact that the constitutional provisions are imperfect. Admitting that the case is incapable of being presented to the supreme court, so that it might adjudge the test oath void for want of constitutionality, or might command an admission to the seat, and yet that would not show that the system is inadequate to a correction of the supposed departure in requiring an unconstitutional test of membership. The Congress may repeal the law which they had improvidently enacted. The admission of the man to the seat, whilst the enactment is not formally repealed, would be a virtual repeal in the particular case; and *that*, it is supposable, would be done in any case in which one branch of the Congress would decide that the enactment was unconstitutional which prescribed the religious or other test oath, the other branch dissenting and insisting it shall remain in the forms of law. But suppose the Congress will neither repeal the test, nor will either branch admit a man elected who will not take the oath, it will be *in vain* that the whole body of the electors shall, though never so deliberately, have sent up the man deemed by the body, inadmissible. Yet, for all that,

it is only an inconvenience, of the same sort, and differing only in degree from the want of representation, by the death or the expulsion of a member, during the interval until the vacancy is filled. The greater inconvenience, if the Congress will persist, can be remedied by the recurring elections, until the body in both branches is renewed of numbers who *will* formally repeal the obnoxious test. It were better that any portion of the people should be subjected to that inconvenience for any length of time it could possibly exist, than that the doctrine should be received and acted out that enactments, by competent legislative bodies, may be disregarded before they are declared of no effect by the constituted authorities.

To be more explicit, having thus repelled the sentiment at large which asserts that an existing enactment, though never so plainly unconstitutional, may be disregarded, and to do exact justice to Mr. Graham, as respects the point on which alone I dissent, he shall here state it as it is in his letter. He recites the oath which, as it is, is to the effect that no one who bore arms in or *countenanced* the late rebellion, shall ever hereafter be elected or appointed to any office in the general government. Admitting, as he does, that whilst the enactment remains in the forms of law, it does exclude from office the nineteen-twentieths who but for the oath would be eligible, Mr. Graham, on the point of our disagreement, still states it thus: "A formal repeal of this law, is not necessary to render it nugatory, so far as relates to its effect on the members of Congress." Mr. G. then proceeds to enumerate instances.

I have conceded in the general argument I have made against the sentiment (which is but too prevalent in favor) of allowable disregard of existing enactments thought by the public or by distinguished men, before being adjudged, to be unconstitutional, that where one branch of a legislature, at any session after the enactment, shall consider it ought to be repealed, it will be apt to regard it as of no force, in the act of organizing the body, even without proceeding to ascertain whether the other branch will concur in the repeal. It might so happen that men in the same class—on the same footing

of legal ineligibility—would be admitted into one branch, and excluded from the seats in the other. This disregard of the law would eagerly seek to find excuse in the fact that "each house is the *judge* of the elections and qualifications," of its own members. But each is the judge, *under* (not above) *the law*. This judicial power would not show, in the supposed case, that the disregard of the law would be justifiable. In point of fact, and to the eye of the law, it would be a demonstration to the contrary. It would show the one house in factious opposition to the recorded concurrent judgment of both. Just such, in the *moral* aspect, at the least, were the cases of Missouri and New Hampshire, as quoted in Mr. G.'s letter. In the teeth of the decennial act of 1842, the house of representatives admitted members elected by general ticket, whilst the act required they should have been chosen by districts in each State. That was simply a disregard of the law; and Mr. G. says so in terms by stating truly that "a majority determined to disregard the law," and did admit the men presenting credentials of election by general ticket, which was the manner of election the law interdicted. That is all that Mr. G. could have said, or any one can say, justly, of that or any other neglect of an existing enactment which is the law, until it is annulled by the competent authority, that is, by repeal or by adjudication; to wit, that it was a disregard of the law. So, the examples cited by Mr. G., as any others that might be, that a formal repeal is not necessary to get rid of a law, only prove a disregard of the law. Then, we are remitted to the question whether it is allowable to disregard the law. The argument that it is not necessary in our system, returns in its majestic strength, and re-asserts that any mischief or inconvenience, if not otherwise regularly corrected, may be removed by the popular elections recurring at short intervals. If there were no remedy, it would not show that the law ought not to be the existing rule. It would only show that the system has not reached perfection and ought to be improved.

PETERSBURG, Nov. 15th, 1865.

It is curious enough that Mr. Seward's instructions to the United States Minister at the Court of France, is somewhat cited as an authority in support of relief from confiscation. The relief is invoked with the understanding, and to advance it, that the Proclamations issued by the Presidents, Lincoln and Johnson, are effectual, and that the intended benefit must be enjoyed, independently of any exercise of authority by the courts. Now, whatever there is in those instructions, it is to this extent, and no more, *that the judiciary of the United States is a co-ordinate department.* The instructions say that should the President attempt an unconstitutional act, "he would be prevented by the judicial authority, even though assented to by Congress and the people." If, then, the President has done the unconstitutional thing of granting pardon with restoration of all rights of property, before conviction—before the persons pardoned are ascertained to be offenders—may not that unconstitutional thing *be prevented by the judicial authority*? May not the independent court proceed to confiscation? After that, the co-ordinate power hitherto of the court, would be at an end; and then, but not till then, the executive authority might interpose—as would be well and wise it should. All acts, of whatever sort, are best in order. Were Congress to repeal the confiscation laws, still the judicial authority would have jurisdiction of cases already arisen under the laws whilst they were in force. He that would be just must be logical.

A few observations of a more general nature may be seasonable. Blackstone says that a reprieve may be granted *before or after* judgment. Whilst that learned commentator does not say that pardon may be granted before conviction, he does say that the court is bound to take notice of it *ex officio;* just as it is, however, of any other public law: and hence it is that the King's charter of pardon must be brought to the knowledge of the court by special plea. Then there is nothing in the authority quoted to show that the party sup-

posed to be an offender can avail himself of a general pardon, until he is at least put upon his trial.

There is much looseness in Kent and Story, and the "Federalist," on this topic of the prerogative of pardon. They say the power of pardon, in the President, is unlimited—general—unqualified—except in cases of impeachment. Is such the true construction of the grant of the power? The language of the constitution is, *pardons for offences* against the United States. The limitation is twofold. There must be an offence, and it must have been committed against the United States. Nor is that all. The offence itself is not pardoned, but it is the *offender* to whom the pardon must convey a remission of the penalty annexed. When does the penalty attach? On conviction, and not before. The offence and the offender must be ascertained and identified, and this can only be done judicially, whenever, as in American governments, Story says not more aptly for another purpose, "there is a separation of the general departments of government, legislative, judicial, and executive, and the powers of each are administered by distinct persons." Indeed, in all the American *authorities*, there is but one statement, (so to call it,) which goes to show the opinion of commentators to be that pardons may be granted before conviction or arraignment, and this partakes more of the looseness of the demagogue, than the accuracy of the jurist. That is as follows: "The principal argument for reposing the power of pardon in the executive magistrate in cases of treason, is, that in seasons of insurrection, or rebellion, there are critical moments when a well-timed offer of pardon to the insurgents, or rebels, may restore the tranquility of the commonwealth." Does that declamation outweigh the solid view by which Story repulsed Blackstone's slur that "the power of pardon cannot exist in a democracy"—to wit: that the legislative, judicial and executive department each has its appropriate duties assigned by a written constitution, imposing limitations on each! Logic forbids it.

It *is* salutary and wise, as Story argues, that the power of pardon is confided to the executive, and for the reasons he

assigns, and others; and it is a lovely power in its exhibition of clemency. It is a salutary power, with promptness, as a single executive may, to bring to quiet the turbulent in the act of their violence. But, then, nevertheless, it is, in this instance, by the constitutional prescription, only and not beyond, a *promise* of pardon, and to that extent, and in terms, the presidential proclamations to persons in rebellion should be—that if they will at once desist, though convicted thereafter, they shall be pardoned. Why the trial, if pardon certainly is to follow conviction? asks the advocate of exercising the power before conviction or trial. The answer is obvious. The violators of the peace of society should be made to feel that they shall not go to what lengths they please with impunity, and stop just there, and be held to no account. The sound view was expressed the other day, by President Johnson, on the occasion of the presentation, by a deputation of twelve of the fifteen thousand women in Baltimore, of their petition for the pardon and immediate release of Mr. Jefferson Davis, when President Johnston said to them: *the time is not yet come for me to be magnanimous.* Yet, why not in the case of Mr. Davis, as well as in others? The occasion craved the interposition of the just sentiment, that as the obscure are equal to the more distinguished, in the rights of freedom, so also by the law each class is alike liable to its penalties. The President was not governed by prejudice, and he surely will not reply that the law may be made void, or have effect, as the policy or the passions of the day may decide. The spirit of the law was exerting in him its inculcation and controlling influence.

All whatever that has been alleged in conflict with this view, to wit, that the power of pardon conferred by the constitution on the President, consists in and is confined to cases in which the parties have been judicially ascertained to be *offenders,* and the punishment by regular trial according to law has been awarded, is, and only this, that the party, at large, who petitions the President for a pardon, thereby confesses that he is an offender. It would seem to be enough to say, in reply, that such ground of defence of the exercise of the

power before the party is judicially ascertained to be an offender, or, at the least, before being put on trial, is in conflict with a fundamental principle of criminal jurisprudence, to wit, that a confession is not admissible as evidence upon a trial, unless it was voluntary. If induced by fear or the flattery of hope, and, especially if made in the presence of a person in authority over the prisoner, or any party liable to arrest, because under suspicion, the confession is not admissible. In the ground taken in support of the pardoning power in the President, before a trial, both conditions concur, either of which would be enough to exclude the confession as evidence of guilt. The party petitioning is influenced by the flattery of hope, and the extorted confession is made to the man in authority who dispenses the pardon. In illustration of the soundness of the view denying the power, the fact is notorious that many, under the influence of fear, have petitioned for pardon, who needed no pardon, and many more who were pardoned already.

What says DeSolme, of the king's power of pardon? It is that "he can pardon offences, that is, remit the punishment that *has been awarded* in consequence of his prosecution." We should not let the lessons of old England's experience be lost on us, which tell us that there is no better way of building up the royalty of executive power, than by encouraging proclamations from that department in this country. It was said more than eighty years ago, that the "star-chamber differed from all the other courts of law, in this: the latter were governed only by the common law, or immemorial customs, and acts of parliament; whereas the former often admitted for law the proclamations of the king and council, and grounded its judgments upon them. The abolition of this tribunal, therefore, was justly looked upon as a great victory over regal authority."

The writer knows of no authority, in the way of judicial decision, in England or America, to justify the exercise of the power of pardon, with or without restitution of rights of property, before *trial*. The case of *King vs. Amery*, II. T. Reps., adjudicated the question of the power of the crown to pardon a

forfeiture and to grant restitution to a corporator whose rights, whatever they were, of course, were derived to him by the specific provisions of the act of incorporation. The case of the *United States vs. Wilson*, in which Blackstone is quoted, as above, is simply a case of extra-judicial opinion. The question was not before the court, to decide whether the court was bound to take notice of a general pardon which was not before the court by special plea in the case. The facts were, in this case of Wilson, that the pardon referred to was expressly restricted to the sentence of death passed upon the defendant under a former conviction.—So there is nothing in those cases, and there is no other, touching the controverted power of the President to pardon a party before he is put upon his trial or regularly charged with an offence.

Two observations shall conclude all the writer desires to urge for consideration on this subject. The law of Virginia is that no person shall be pardoned *before conviction*, which excludes that idea so much relied on, in the public talk, that a person's petition for pardon is a confession of guilt, and suffices as the foundation for an exercise of the pardoning power. This is of a sort with that other loose notion of the commentators, that the power is confided to the executive, because he can act more promptly than a legislative body, and therefore may grant a pardon and prevent a trial. The confession is extorted by the prospect of pardon, and is not from contrition, is one of the observations I deem important to repeat; and the other is that the executive proclamation to insurgents, ought only to be a *promise* to such as will at once desist, that they shall be pardoned, after being brought by the government's prosecution to conviction.

The writer has here expressed these views of the power of pardon, not with any desire that any thing, in this connection, President Johnson, in his admirable magnanimity, has done, shall be reversed, but with the hope that, as far as they are just, they shall exert their appropriate influence on future occasions, in shaping the legislation under, and the administration of, the government of the federal Union.

The next Congress—The Constitution the South's safest Guide.

PETERSBURG, Nov. 4, 1865.

It is a mistake that is not unfrequently made, that they only who have a duty to discharge officially, have a right to express opinions how it ought to be discharged. It is true that any one who undertakes to declare how another shall discharge a public duty—in which every citizen has an interest and a right to speak—ought to show that he understands the subject. Nor is that quite all. The official, high or low, who is advised in *the right way* to desist from any mode of accomplishing a good end, ought to desist and to adopt the better way advised by any citizen. Under the guidance of these and like sentiments which it would be tedious to enumerate, I have lately exercised my right to suggest how I think the late rebel States ought to be brought back into their regular working in our federal Union. I am gratified to see the Clerk of the House of Representatives concurs in my views. Among other letters that I have had the honor to receive respecting the pamphlet I have lately issued on the subject, there is one from as pure a patriot and as firm a Southern man as any that breathes or has lived, who writes me in these words touching the point in agitation:

"I agree with you very nearly, if not altogether, in respect to the most republican and constitutional mode of re-establishing our Union relations."

Sooner after the end of the war, than any other person, when, of course, I did not have the light of any suggestions from any quarter, except the light shed on the subject by the Constitution of the United States, which was my sole guide, I ventured to develope that plan for reviving our Union relations. It is founded, as the reader has seen, on the provision in that constitution, that the Congress of the States in the constitutional concert, may by law alter or make the regulations for electing the members thereto, from any State that has refused, as all in the rebellion did refuse, to renew their congressionol representation. Now, then, is the time for the Congress to act by a law to fix the times for making those elections.

On an aspect of the subject just beginning to be developed, I will here express my opinion.

It was a wise precaution in the House of Representatives to arm its clerk with authority to put on the roll of members, *such only* as have *proper* credentials. That does not make the clerk the judge to determine who is entitled to be the sitting members. It only charges him with the duty of judging who shall participate in organizing the House. In the New Jersey case, in which the contestants were not called in organizing the House, the clerk was sustained, although there was not, as there now is, a positive law to regulate his conduct. If that preliminary authority was not lodged somewhere, and no where can it be more under the control of the House, than in the clerk, men might get in, and, in organizing, defeat those entitled to be the sitting members. It is manifest that the present clerk takes the right view of the act of March 3, 1863, wherein he regards it as requiring that the elections shall have been in accordance with the laws of the States respectively, *and* of the United States. If that were not so, then the ratio of representation might be disregarded to the extent of a State's sending up twenty, instead of any smaller number, to take part in organizing the House. The matter is too plain for debate. The House, by that act, was intending to protect itself. Certainly, however the disjunctive *or* has crept into that act, it is out of place. It would, if it were meant to be there, disjoin the House from the laws itself had concurred in making. Instead of protecting itself, it would, by using terms allowing the alternative of complying with any but its own laws, open a door for occasions of subordinating itself to the laws of a State. But let it be that the Congress intended the alternative that the laws of a State might govern and be obeyed in derogation of its own, and still the clerk is right, because there are as yet no *laws* in the States lately in rebellion, which authorize elections to the Congress, nor can be, until the Congress shall give vitality to their enactments. It is alone the Congress that can clothe these States with "change of raimant"—even with the festal robes of Federal service, instead of the cast-off garments of rebellious State "sovereignty."

I have not failed to see the eagerness of the people in the South to have civil law restored, and I unite in that earnest desire. Still I believe that the dignity of the State is sunk in making, and will yet, I fear, be lowered more by insisting on, elections without first being authorized by the Congress. Nor have I failed to see that under the ill-judged counsels of the newspaper press in the South, our people are likely to consider the rejection of the lately elected members to the Congress of the United States, as a great grievance to the South, and an act of which the South will have just cause of complaint against the North. My object has been, and will be, by all the means I can, to convince the people of the South, that the refusal by the Congress to admit these men to seats, is the constitutional duty of the Congress, and the highest measure of safety for the South. The firmest safeguard of the South is a strict observance of the constitution; and any complaint in the South against the North for adhering to the constitution, ought to be prevented, if possible. It is better we should stay out of the Union, in the way of having no representatives in the Congress, for five years to come, than that the constitution shall be violated in admitting them. What is it, but that power, which constrains the President to declare that the right to regulate suffrage is a right the people of the several States comprising the Federal Union, have righteously exercised from the origin of the government to the present time? It is alone that constitution which is so thoughtlessly said to be dead and buried, that is that constraining power justifying the President. There is no other barrier encountering the flood of arbitrary power. Let that barrier be broken down, and where is the resort or the appeal of the people of the South! And still, (how strange it is!) the people of the South are ready to say that the North is unjust, revengeful, and what not, if any plan the quickest, however unconstitutional, to bring in the reign of civil law, shall be rejected by the North in Congress. For one, I will not join in that injustice.

The Writ of Habeas Corpus.

PETERSBURG, Nov. 24th, 1865.

In all the legislation in the federal or the "Confederate" Congress, none was more alarming to the friends of civil liberty, than were the laws suspending the privilege of that writ. In the Senate of Virginia, where this writer was during most of the war, he devoted much of his labors to prevent the suspensions of the writ, in which, in concert with others, he had some success, and in preventing the trial of civilians by courts-martial, in which last it was his fortune, after a severe struggle, to have complete success. The writer had occasion there to make speeches in which it was his object to define what is the privilege, and what is a constitutional suspension, of the writ; and to argue that it ought not ever to be suspended. He will insert here an extract from that definition and argument.

EXTRACT:

I therefore renew the inquiry, *what is that privilege?* It is the right of the party in custody, to have the summary judgment of the law of the land, upon the alleged cause for the restraint of his personal liberty. The award of the writ to the petitioner, by the competent authority of the court or the judge, is to the effect that the prisoner shall not absolutely be detained to await a trial in the regular course of law, but shall have an earlier opportunity to be confronted with the witnesses against him, in order to prove his innocence, or that there is at most against him only a light suspicion. The principle of the criminal law, that the accused, on his trial, is presumed to be innocent, until his guilt is proved, is reversed, and on this summary hearing which the award of the writ secures to him, he is presumed to be guilty, until he proves his innocence, or that there is only a light suspicion of guilt against him. In the one case, the accused will be released; in the other let to bail—and if he can establish neither his innocence, nor a light suspicion only, he will be remanded to the custody from which he was taken by the award of the writ. Such is precisely the privilege. A suspension of the

privilege, then, hath this extent, and no more, that the party held in custody, is compelled, in virtue of his arrest, to await in prison the regular trial appointed by the law. The suspension of the privilege does not deprive the prisoner, of the right to be regularly tried, but simply withholds the quicker hearing and decision of his case. But a practice prevails which makes void the constitutional assurance of a speedy trial by jury, and usurps a control beyond what the amplest lawful suspension of the privilege of the writ, can confer. This practice denies any trial at all, and keeps the party restrained of his liberty, as if imprisonment were not punishment, but merely a pleasant pastime. Nor are the rights of speedy trial by jury, the only constitutional rights that have usually been and are quite certain to be taken from the citizens, by legislative acts suspending the privilege of the writ. It is apt under the suspensions to be forgotten that men's persons are not to be seized, except by virtue of the precept of the civil magistrate, issued upon probable cause and supported by oath. In the operations of the civil authority, it is often overlooked that the warrant is the constitutional precursor of seizures of the person. The practice is most injurious to the pride of a free man. If it be civil liberty where that practice is always apt and almost sure to ensue any suspension of the privilege of the writ, and it may, by authority given by the constitution, be suspended at the will of the men in office, then let me live where avowed despotism reigns.

Having shown thus what the privilege of the writ is, and what the extent of a lawful suspension is, I will proceed to show that it ought not ever to be suspended. It is only some supposition of a necessity, in time of war in some form, either foreign or intestine, that can come to the mind to excuse the existence of a power, any where lodged, in a free system, to suspend the privilege of the writ. The founders of our system restricted the exercise of the power to the Congress, in cases of rebellion or invasion, and in such periods only when "the public safety requires it." What is the public safety? As it has been in all times and tongues, so it is yet. In the opinion of the tyrant, the public safety subsists in his own

safety—not alone in the security of his person, but (be the tyrant king or congress) in the security to himself of the despotic power. The conception and contemplated impression on the mind of the ruling power aiming to be despotic, is the safety of the usurped power to augment that power. So unsafely for civil liberty, is the public safety guarded by the granted power to suspend the privilege of the writ. But suppose the power lodged where it will not be abused. Suppose further that the practice of denying or even unduly delaying the regular trial, be not suffered to prevail when the privilege of the writ is suspended. Why, even in such case, should the privilege of the writ be suspended? The citizens or strangers under arrest and in custody, must be guilty or innocent. If guilty, all good men will agree, they ought to be tried and punished. If innocent, all men everywhere, but bad men, will agree, they should be set free or let to bail. Show, who can, why the privilege of the writ should ever be suspended. Show, who can, how the public safety can ever be served by it. Show, who can, why, in any conceivable case, any one shall be denied an opportunity in advance of the regular trial, to prove his innocence.

THE RIGHT WAY

FOR

Restoring the late Rebel States

TO

THE FEDERAL UNION;

OR,

AN ARGUMENT INTENDED TO INDUCE THE PEOPLE AND PUBLIC MEN, IN MAKING ELCTIONS AND FILLING OFFICES,

STATE AND FEDERAL,

TO BE GOVERNED BY

THE CONSTITUTION OF THE UNITED STATES.

"The subject who is truly loyal to the Chief Magistrate, will neither advise nor submit to arbitrary measures."—JUNIUS.

SECOND EDITION.

By Robert R. Collier, Esq.

PETERSBURG:
PRINTED BY A. F. CRUTCHFIELD & CO., BANK ST.
1865.

HOLDING FORTH THE CONSTITUTION,

AND INVITING CONCURRENT LAWS.

THE writer of this pamphlet which his limited means deny him the privilege of enlarging, as he might with as much more matter already prepared for it, as is embraced in it, does not without inconvenience spare the amount required to pay for printing its present length. Yet, if he did not believe its value to any one who will buy and read it, will exceed the price it will be offered at, he would not offer it for sale, but give it away, as with his productions often before he has done. Its value is in the influence it is intended to exert in support of law and order. Surely, no patriot will consider of no value any effort that is sincere and conservative in support of our system of which Mr. Madison, in 1833, said: "The happy union of these States, is a wonder; their constitution a miracle; their example the hope of liberty throughout the world."

This pamphlet proceeds on the supposition that the United States are *intended* to be governed by law, and that neither the States, nor the people of the United States, have agreed to have, or require, a despot or dictator to rule them.

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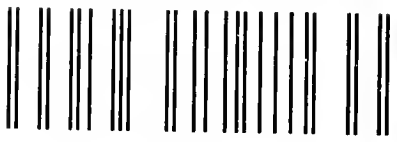
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